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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN RE-INSURANCE COMPANY
and NAC REINSURANCE CORPORATION,

Petitioners,

—v.—

JOHN P. CRAWFORD, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, AS RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED

I. Whether the Federal Arbitration Act is reverse preempted by state laws (a) granting state courts exclusive jurisdiction over delinquency proceedings against insurance companies and (b) allowing state courts to enjoin *in personam* actions in federal court.

II. Whether the McCarran-Ferguson Act empowers state courts to enjoin *in personam* federal court actions against insurance companies.

PARTIES TO THE PROCEEDING BELOW

The appellants in the Fifth Circuit, who are petitioners here, were Munich American Reinsurance Company and NAC Reinsurance Corporation. Munich American Reinsurance Company has been merged into American Re-Insurance Company. The appellee in the Fifth Circuit, who is the respondent here, was John P. Crawford, Insurance Commissioner of the State of Oklahoma, as Receiver of Employers National Insurance Corporation.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONERS

1. American Re-Insurance Company (Munich American Reinsurance Company, an appellant in the Fifth Circuit was merged into American Re-Insurance Company):

   Parent Companies:
   Munich Reinsurance Company of Munich, Germany
   American Re Corporation

   Nonwholly Owned Subsidiary Companies:
   None

2. NAC Reinsurance Corporation:

   Parent Company:
   NAC Re Corporation

   Nonwholly Owned Subsidiary Companies:
   None

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IN THE
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AMERICAN RE-INSURANCE COMPANY
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JOHN P. CRAWFORD, INSURANCE COMMISSIONER
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EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, issued and entered in this case on June 2, 1998.

OPINIONS BELOW

The Fifth Circuit's opinion (Appendix A)[1] is reported at 141 F.3d 585. The unpublished judgment and order of the district court entered on February 28, 1997, dismissing the petition to compel arbitration under the *Burford* abstention doctrine, are reproduced in Appendix B. The district court's unpublished orders of November 14, 1996, October 9, 1996, and September 18, 1996, are reproduced at Appendix C, D, and E, respectively.

JURISDICTION

The Fifth Circuit's judgment was entered June 2, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are: the U.S. Const. Art. III, § 2, cl. 1 and Art. VI, cl. 2 (Appendix F), the pertinent provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (Appendix G), the pertinent provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (Appendix H), 28 U.S.C. § 1332(a) (Appendix I), and the pertinent provisions of the Oklahoma Uniform Insurers Liquidation Act, Okla. Stat. tit. 36 §§ 1901-1921 (Appendix J).

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[1] References to "App. __a" are to the Appendix.

STATEMENT OF THE CASE

The central issue in this case is whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16, (the "FAA") is reverse preempted by state laws giving state courts exclusive jurisdiction over delinquency proceedings against insurance companies. A related issue is whether the McCarran-Ferguson Act gives States the power to enjoin *in personam* actions in federal court against insurance companies. Because of the widespread use of arbitration in the insurance and reinsurance community, these are issues of national and international concern.

A. Proceedings in the Federal District Court

In 1986, Petitioners American Re-Insurance Company[2] and NAC Reinsurance Corporation entered into reinsurance contracts with Employers National Insurance Company ("ENIC"). (App. 2a-3a.) In 1994, Oklahoma placed ENIC in liquidation and appointed the Oklahoma Insurance Commissioner, Respondent John P. Crawford, as Receiver. (App. 3a.) Respondent refused to honor ENIC's written agreement to arbitrate contractual disputes in Texas. (App. 45a-46a.)

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[2] Munich American Reinsurance Company, an appellant in the Fifth Circuit, has been merged into American Re-Insurance Company.

Consequently, Petitioners filed a petition under Section 4 of the FAA and 28 U.S.C. Section 1332(a), in the United States District Court for the Northern District of Texas, to enforce the parties' written agreements to arbitrate. (App. 45a.) Respondent submitted to the jurisdiction of the district court, defended the petition on its merits, and lost. (App. 38a-39a, 48a.) The district court found that ENIC was a party to the reinsurance contracts and had agreed to arbitrate disputes arising under the contracts. (*See* App. 47a.) Accordingly, the court ordered the parties to arbitrate in accordance with the terms of the reinsurance agreements. (App. 48a.)

Respondent moved for reconsideration on the merits. (App. 38a.) Alternatively, he asserted -- for the first time -- that an injunction in the state court order placing ENIC into liquidation (the "liquidation order") barred Petitioners' initial filing of their petition in the district court. (*See* App. 38a.)

The district court denied Respondent's motion in its entirety. (*See* App. 42a-43a.) Having found that the parties agreed to arbitrate, the court concluded "its role in this litigation [had] terminated." It also observed that the state court was the court that should interpret and enforce the liquidation order injunction. (App. 42a.) Respondent then moved the state court to enjoin the arbitration and to hold Petitioners in contempt for initially filing their petition in the district court. (*See* App. 33a.) The state court did not grant this relief. Petitioners then moved the district court for an injunction to enforce its arbitration order. In response, the district court "clarified" its order, stating that Respondent should move to dismiss the federal petition if the state court held that Petitioners violated the injunction in the liquidation order. (App. 34a.) After Respondent advised the

state court of the district court's "clarification," the state court held that Petitioners violated the liquidation order by filing a federal petition. (App. 30a.)

Thereafter, the district court granted Respondent's motion to dismiss, vacated its order compelling arbitration, and dismissed the petition under the *Burford* abstention doctrine, without prejudice to refiling in the state court. (App. 28a, 30a-31a.)

B. The Fifth Circuit's Decision on Appeal

On appeal, the Fifth Circuit held that under this Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), the district court erred in dismissing the federal petition under *Burford*, because the district court had no discretion to deny the relief Petitioners sought. (App. 10a-11a.) The Fifth Circuit acknowledged that States cannot divest federal courts of diversity jurisdiction. (App. 25a.) It also agreed that the dispute Petitioners sought to arbitrate was "committed to arbitration under the reinsurance agreements." (App. 21a-22a.) Nonetheless, the Fifth Circuit held that the FAA was reverse preempted by Oklahoma law under the McCarran-Ferguson Act. (App. 25a-26a.)

The Fifth Circuit reasoned that, viewed in its entirety, Oklahoma's Uniform Insurers Liquidation Act (the "OUILA") regulates the business of insurance because liquidating insolvent insurance companies in an organized manner is crucial to the relationship between insurance companies and policyholders. (App. 16a.) The court conceded that its reasoning that the entire OUILA regulates the "business of insurance" might be inconsistent with this Court's decision in

United States Department of Treasury v. Fabe, 508 U.S. 491 (1993), but concluded that "*Fabe*'s holding in this respect is simply unclear." (App. 17a.)

The Fifth Circuit held that, in any event, two provisions of the OUILA regulate the "business of insurance": Section 1902, which declares that the Oklahoma County District Court (the "state court") has "exclusive jurisdiction" over "delinquency proceedings" (the "jurisdictional statute"); and Section 1904, which grants the state court the power to issue injunctions in connection with insurer delinquency proceedings (the "injunction statute"). (App. 18a.)

Neither statute refers to or is limited to policyholder-creditors. *See* Okla. Stat. tit. 36 §§ 1902, 1904 (LEXIS through 1997 First Sess.). The Fifth Circuit conceded that these statutes do not solely benefit policyholders and that any benefit to policyholders is indirect. (App. 20a-21a.) Further, because Oklahoma laws do not divest the federal courts of diversity jurisdiction (App. 25a) the Fifth Circuit necessarily conceded that the state court's jurisdiction over the dispute was not "exclusive."

The Fifth Circuit believed, however, that consolidation of all actions in a single court, "enforced through injunctions, [benefits policyholders by conserving] the insurance company's assets for ultimate payment to policyholders as well as other creditors." (App. 19a.) Accordingly, the court held that the jurisdictional and injunction statutes regulate the business of insurance because they were "reasonably necessary to further the goal of protecting policyholders." (App. 20a.)

Neither the jurisdictional or injunction statutes nor the liquidation order expressly bars arbitration. Nevertheless, the Fifth Circuit determined that:

> Regardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the [state] court nevertheless conflicts with the Oklahoma law giving the state court the power to enjoin any action interfering with the delinquency proceedings.

(App. 23a.) Moreover, the court of appeals held that, although state courts "generally" cannot enjoin *in personam* federal actions, Congress bestowed broad power on the States under the McCarran-Ferguson Act to enjoin federal proceedings when the state is acting under a law that regulates the business of insurance. (App. 24a-25a.) Because the liquidation order contained an injunctive provision, the Fifth Circuit held that the statute was "sufficient[ly]" impaired by the FAA so as to "trigger the McCarran-Ferguson Act." (App. 24a.)

The Fifth Circuit made clear that it was *not* holding that Petitioners have no right to arbitrate; only that the federal court had no power to compel arbitration. (App. 22a & n. 5; App. 26a.) Thus, the court affirmed the district court's dismissal without prejudice to refiling the "petition [in] the Oklahoma state court for an order compelling arbitration of their dispute." (App. 26a.)

The court acknowledged that in *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992), "a case very similar to the instant case, the Ninth Circuit rejected [the] argument that state insurance insolvency laws were impaired by

having the dispute arbitrated under the FAA." (App. 22a-23a n.6.) The Fifth Circuit, however, expressly declined to follow *Bennett*. (*Id.*)

For the reasons that follow, this Court's review of the Fifth Circuit's decision is warranted.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holdings that procedural provisions of state insurer liquidation acts reverse preempt the FAA under the McCarran-Ferguson Act and that the McCarran-Ferguson Act allows state courts to enjoin federal actions, and the similar holding of the Second Circuit, directly conflict with decisions in the First, Third, Eighth, and Ninth Circuits. As a result, a party that seeks to enforce its contractual rights by moving a federal court to compel the liquidator of an insolvent insurance company to arbitrate will face different outcomes in different circuits. The motion would succeed in the First, Third, Eighth, and Ninth Circuits but would now fail in the Second and Fifth Circuits.

The Fifth Circuit's decision undermines the strong federal policy favoring arbitration, reflected in the FAA and acknowledged by this Court, by eviscerating the federal right to enforce agreements to arbitrate if one party becomes insolvent. The insurance and reinsurance industry is a national and international industry that relies heavily on arbitration before industry professionals to resolve complex industry disputes. *See* Richards D. Barger & Dennis C. Quinn, *Foreign reinsurers' ability to arbitrate disputes with the liquidators of*

insolvent insurers, 4 Int'l J. Ins. L. 235, 235 (Oct. 1995). The Fifth Circuit's decision also allows state courts to oust federal courts of their diversity jurisdiction in actions against insurance companies. Finally, the Fifth Circuit's misapplication of this Court's decisions in *Fabe* and other McCarran-Ferguson Act cases will lead to confusion and misunderstanding in the law in determining whether procedural provisions of state insurer liquidation laws are "impaired" by federal laws and whether laws regarding the procedures for adjudicating disputes are laws regulating the "business of insurance."

The issues in this case are certain to recur time and again. Virtually every State has an insurer liquidation act similar to the OUILA. Consequently, in recent years one of the most widely litigated issues relating to reinsurance has been whether the liquidator of an insolvent insurance company can be compelled under the FAA to arbitrate disputes arising out of the reinsurance contract. *See* Robert M. Hall, Comment, *Recent Case Developments on Arbitration in US Receiverships*, 1 Int'l J. Ins. L. 51, 51 (Jan. 1998); John H. Binning & Timothy L. Moll, *Arbitration of Reinsurance Disputes in Liquidation of Insurance Companies*, 32 Tort & Ins. L.J. 937 (1997); Barger & Quinn, *supra*, at 235.

I. THE FIFTH CIRCUIT'S DECISION THAT THE FAA IS REVERSE PREEMPTED BY THE OKLAHOMA INSURER LIQUIDATION LAWS, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

A. The Fifth Circuit's Decision Conflicts With Decisions of Other Circuits

A state law cannot reverse preempt a federal law under the McCarran-Ferguson Act unless the federal law invalidates, impairs, or supersedes the state law and the state law is enacted to regulate the "business of insurance." 15 U.S.C.A § 1012(b) (West 1997). The Oklahoma jurisdictional and injunction statutes at issue in this case are procedural; they do not bear on ENIC's substantive rights or obligations under the reinsurance agreements. *See* Okla. Stat. tit. 36 §§ 1902, 1904. The Fifth Circuit's conclusion that the FAA is reverse preempted by these statutes conflicts with decisions of the Ninth,[3] Third,[4] Eighth,[5] and First[6] Circuit Courts of Appeal. Indeed, the Ninth and

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[3] *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992).

[4] *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953 (3d Cir. 1993).

[5] *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996), *cert. denied*, 138 L. Ed. 2d 210, 117 S.Ct. 2452 (1997).

[6] *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993); (continued...)

Third Circuits specifically concluded that arbitration under the FAA would not interfere with insurer delinquency proceedings, and the FAA applied irrespective of state insurer liquidation laws and the McCarran-Ferguson Act.[7]

The Fifth Circuit admitted that its decision conflicts with the Ninth Circuit's decision in *Bennett* on facts that were very similar to this case. (App. 22a-23a n.6.) In *Bennett*, a reinsurer removed a Montana liquidator's action to federal court, then moved under the FAA to compel the liquidator to arbitrate. *Bennett*, 968 F.2d at 970. Like Oklahoma, Montana's insurer liquidation act is comprehensive and purports to be "exclusive." *See id.* at 972; Mont. Code Ann. §§ 33-2-1301-1311, 1305 (LEXIS through 1997 Sess.). Also like the OUILA, the liquidator can obtain injunctions under the Montana act to prevent interference with the delinquency proceedings. *Id.* § 1309.

As here, *Bennett* involved the enforcement under the FAA of the reinsurer's contractual right to arbitrate. *Bennett*, 968

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[6] (...continued)
Garcia v. Island Program Designer, Inc., 4 F.3d 57 (1st Cir. 1993).

[7] In *Stephens v. American International Insurance Co.*, the Second Circuit held that the entire Kentucky liquidation scheme in general, and a liquidation statute that expressly precluded arbitration in particular, reverse preempted the FAA under the McCarran-Ferguson Act. *Stephens*, 66 F.3d 41 (2d Cir. 1995). The OUILA does not refer anywhere to arbitration. Moreover, for the same reasons that the Fifth Circuit's decision here was wrong, *see infra* at 17-26, *Stephens* was also incorrectly decided.

F.2d at 971-72. The Ninth Circuit held that compelling arbitration under the FAA would not impair orderly liquidation or interfere with the state insurer insolvency laws and the state insurer insolvency laws did not reverse preempt the FAA. *Id.* at 972-73[8]; *see also Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52, 56-57 (W.D. Mo. 1985) (FAA does not conflict with insurer insolvency act).

Although it recognized the conflict, the Fifth Circuit expressly declined to follow *Bennett*, suggesting that the Ninth Circuit misapplied the rule of comity under which courts will decline to exercise *in rem* or *quasi in rem* jurisdiction if another court has already assumed jurisdiction over the property. (App. at 22a-23a n.6.) The Fifth Circuit is plainly incorrect in that regard. As the court of appeals recognized when it held *Burford* inapplicable, a petition to compel arbitration is an *in personam* proceeding. Petitioners' federal action involved a single issue: whether ENIC is a party to the reinsurance contracts that give Petitioners the right to arbitration. (App. 42a.) The district court did not need control of property to adjudicate this issue. (*See* App. 46a-48a.)[9] At any rate, the Fifth Circuit's suggestion

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[8] The Ninth Circuit reaffirmed *Bennett* in *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997).

[9] The underlying dispute to be arbitrated is also a simple contract dispute, to be determined under Texas law (*see* App. 41a-42a). The arbitrators do not need possession of property held by the liquidator to interpret the contracts under Texas law and rule on the parties' contractual rights and obligations. Rather, the "[determination of the existence and amount of the indebtedness], which is spoken of

(continued...)

that the Ninth Circuit misapplied the rule by which courts in *in rem* and *quasi in rem* actions defer to the first court assuming jurisdiction, was not integral to the Fifth Circuit's decision. In the end, the Fifth Circuit held that the FAA is reverse preempted by the jurisdictional and injunction statutes "regardless of the nature of the dispute." (App. 23a.)

The Fifth Circuit's decision also conflicts with the Third Circuit's reasoning in *Grode*. In *Grode*, the reinsurers sought to enforce their federal rights to arbitrate after they removed an insurance liquidator's action to federal court. *Grode*, 8 F.3d at 955. Like *Bennett* and this case, Pennsylvania's insurer insolvency act is comprehensive. *See id.*; Pa. Stat. tit. 40 §§ 221.23-221.52 (LEXIS through 1997 Sess.). Although *Grode* was an abstention case, the liquidator there argued that the McCarran-Ferguson Act supported its position that the dispute could not be arbitrated. Contrary to the Fifth Circuit's conclusion here, the Third Circuit rejected the liquidator's argument, holding that the McCarran-Ferguson Act was "totally irrelevant." *Grode*, 8 F.3d at 960. The Third Circuit also held that the mere exercise of federal jurisdiction over "an ordinary contract action in which the plaintiff happens to be an insolvent insurance company" would not interfere with the delinquency proceedings. *Id.* at 961. Finally, the Third Circuit held that "the state's interest in regulating insurance companies does not

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[9] (...continued)
as the liquidation of a claim, is strictly a proceeding in personam." *Riehle v. Margolies*, 279 U.S. 218, 223-24 (1929).

stretch to this situation because there is not a large number of similarly situated plaintiffs racing to the courthouse." *Id.*[10]

As in *Grode*, resolution of the contractual dispute in arbitration will not interfere with the delinquency proceedings. In *Grode*, the court recognized that policyholders have an interest in a uniform interpretation of the standard form policies issued by insurance companies. *Id.* at 960. But unlike the form policies insurance companies issue to policyholders, reinsurance contracts are negotiated agreements between sophisticated business parties. Further, this case is not a coverage dispute and it does not involve policyholders. Rather, this case involves the interpretation of contracts solely between Petitioners and ENIC. (App. 46a-47a.) The dispute is unique to the terms of the parties' contracts. Federal court enforcement of the arbitration agreements will not lead to rulings that conflict with the interpretation of policies ENIC issued to policyholders, piecemeal litigation of policyholder claims, or unequal treatment of policyholder claims. Rather, Petitioners and other similarly situated parties will be disadvantaged if arbitration clauses in otherwise enforceable contracts involving interstate commerce are dishonored by some circuits and not others.

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[10] Although the action in *Grode*, like *Bennett*, was removed to federal court, removal is only proper if an action could have been initiated in federal court. *See* 28 U.S.C.A. § 1441(a) (West 1994). Thus, there is no meaningful distinction in this case simply because Petitioners' motion to compel was initiated in federal court. In either case, a court other than the state court orders arbitration and the underlying dispute is resolved outside the state court.

Similarly, the Fifth Circuit's conclusion that delinquency proceedings would be impaired if *in personam* disputes are resolved outside the liquidation court (App. 23a) also conflicts with the Eighth Circuit's contrary conclusion in *Murff*. In *Murff*, the plaintiff brought a federal court action under the Age Discrimination in Employment Act ("ADEA") against an insurance company in rehabilitation under Missouri's insurer insolvency act. *Murff*, 97 F.3d at 290. After Murff filed the federal action, the rehabilitation was converted to a liquidation. *See id.* Like the OUILA, "delinquency proceedings" under the Missouri insolvency act are the sole means of liquidating insurers and the liquidator can obtain injunctions to prevent interference with the liquidation. Mo. Rev. Stat. §§ 375.1154-55 (LEXIS through 1997 Sess.). The district court dismissed Murff's federal action, finding that the McCarran-Ferguson Act precluded the federal court from "exercising jurisdiction because 'the independent exercise of [federal] jurisdiction . . . would impair [the insurer insolvency act].'" *Murff*, 97 F.3d at 290.

The Eighth Circuit reversed. *Id.* In contrast to the Fifth Circuit, the Eighth Circuit held that the exercise of federal jurisdiction over a federal claim would not so impair the liquidation that it would run afoul of the McCarran-Ferguson Act. *Id.* at 292.

The Fifth Circuit's decision also conflicts with the First Circuit's decision in *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993). Unlike the Fifth Circuit, the First Circuit held that allowing an action against an insolvent insurance company to proceed in federal court would not impair Puerto Rico's version

of the UILA[11] because the UILA provisions were purely procedural and did not "absolve the insurer of any substantive liability." *Id.* at 882.

The Fifth Circuit's holding that the OUILA's jurisdictional and injunction statutes -- procedural statutes that do not differentiate between actions involving policyholders and those involving nonpolicyholders -- regulate the business of insurance, also conflicts with the First Circuit's decision in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993) (Breyer, J.). In *Garcia*, a federal priority statute that gave the government first priority in bankruptcy conflicted with a Puerto Rico insurer liquidation statute that barred claimants who filed late proofs of claim from sharing in the distribution of the estate unless all other claims had been paid. *Id.* at 58, 61. The insurer liquidation statute did not directly benefit policyholders. Rather:

> [I]t help[ed] policyholders only to the extent that (and in the same way as) it help[ed] all creditors. That is to say . . . the Commonwealth provision may bring about more speedy, orderly liquidation proceedings, thereby (perhaps) reducing the risks (and costs) of extending credit to the company.

Id. at 62. Although the liquidation statute in *Garcia* made the liquidator's job easier and relieved him of the burden of searching for recorded liens, then-Judge Breyer, writing for a

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[11] P.R. Laws Ann. tit. 26 §§ 4000-54 (LEXIS through 1992 Sess.).

unanimous panel, concluded that the statute provided policyholders with only an indirect, speculative benefit that was far too tenuous to prevent federal preemption. *Id.*; *see also Costle v. Fremont Indem.*, 839 F. Supp. 265, 274 (D. Vt. 1993) (insurer liquidation statute establishing procedures for collecting reinsurance proceeds not enacted to regulate the business of insurance).

Like the state statute at issue in *Garcia*, the jurisdictional and injunction statutes at issue here are, on their face, neutral as to the benefit (if any) provided to creditors that were policyholders as compared to the benefit (if any) provided to other creditors of an insolvent insurer. *See* Okla. Stat. tit. 36 §§ 1902, 1904. Neither provision even mentions policyholders, *see id.* §§ 1902, 1904. The Fifth Circuit conceded that creditors other than policyholders may also benefit from consolidation of claims in one court. (App. 19a-20a.) Moreover, the "benefit" provided to policyholders by requiring that all actions to establish ENIC's indebtedness must be brought in Oklahoma is purely speculative. Thus, to paraphrase the First Circuit in *Garcia*, while the jurisdictional and injunction statutes *might* make liquidation proceedings more orderly, thereby (*perhaps*) reducing the costs, liquidation would still be manageable without such provisions. *See Garcia*, 4 F.3d at 62.

B. The Fifth Circuit's Decision Cannot Be Reconciled With Decisions of This Court

Not only does the Fifth Circuit's decision conflict with the decisions of other courts of appeal, it is plainly incorrect under this Court's decisions. In *United States Department of Treasury v. Fabe*, this Court considered whether a claim-

priority statute in a state insurer liquidation act regulated the business of insurance. *Fabe*, 508 U.S. 491, 496-97 (1993). The state priority statute was part of a "complex and specialized administrative structure" that regulated "insurance companies from inception to dissolution." *Id.* at 494. The state liquidation statute in *Fabe* "proclaim[ed] as its purpose, 'the protection of the interests of insureds, claimants, creditors, and the public generally.'" *Id.*

In *Fabe*, this Court rejected the argument that *any* state law that indirectly benefits policyholders is exempt in its entirety from preemption by a conflicting federal law. *Id.* at 508-09 & n.8. Rather, the Court explained that each provision must be analyzed separately. After engaging in that analysis, the Court concluded that a provision of the state priority statute giving policyholders a direct benefit -- first priority over other creditors -- was exempt as a law regulating the "business of insurance." *Id.* at 508. The only other provision of the statute that was held to regulate the "business of insurance" was a provision giving priority to the payment of administrative expenses. *Id.* at 509. Although the benefit to policyholders of paying administrative expenses was indirect, ensuring payment of such expenses was necessary for the liquidation to *begin*; it did not merely make the liquidation more "orderly" or "manageable." *Id.*

The Fifth Circuit's conclusion that the OUILA's jurisdictional and injunction provisions are laws enacted to

regulate the business of insurance contravenes *Fabe*.[12] Like the priority provisions in *Fabe* found not to contain preemptive force, provisions enabling consolidation of all proceedings in a single court are not essential to the State's ability to liquidate insolvent insurance companies. Indeed, the OUILA (like similar statutes in other states) only provides for home court exclusive jurisdiction over "delinquency proceedings." Okla. Stat. tit. 36 § 1902. "Delinquency proceedings" are proceedings: (i) "commenced [by the Insurance Commissioner] against an insurer"; (ii) "pursuant to [the OUILA]"; (iii) "for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer." *Id.* §§ 1901, 1903. Federal court proceedings that are: (i) commenced by individuals or corporations; (ii) pursuant to federal statutes; (iii) for the purpose of enforcing federal rights, are *not* delinquency proceedings over which the state has asserted exclusive jurisdiction. *See id.* §§ 1901-03. Further, the OUILA expressly provides that controverted claims belonging to claimants in reciprocal states may *be proved in ancillary proceedings in those states. Id.* § 1916.

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[12] The Fifth Circuit's suggestion in dictum that the entire OUILA regulates the "business of insurance," is also irreconcilable with *Fabe*. Under the Fifth Circuit's analysis, the entire priority provision in *Fabe* – one piece of a statutory scheme like the OUILA – would have been exempt from preemption by the conflicting federal priority statute. This Court, however, held otherwise. *Fabe*, 508 U.S. at 508-09. Although the Fifth Circuit stated that this Court's holding in that respect was "unclear" (App. 17a), this Court expressly rejected the broad approach suggested by the Fifth Circuit. *Fabe*, 508 U.S. at 509 n.8.

Moreover, the jurisdictional and injunction statutes do not directly benefit policyholder-creditors. A single consolidated proceeding only benefits policyholders indirectly, if at all. In this respect, these statutes are fundamentally unlike the priority accorded policyholders in *Fabe*. They are also unlike the priority given administrative expenses in *Fabe*. These provisions are like the priority provisions in *Fabe* and the late notice of claim statute in *Garcia* that were found to be without preemptive force because -- at best -- they only affected creditors as a whole.

The Fifth Circuit's decision also fails to apply the three-part test for determining whether a particular practice is the business of insurance as established in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982). Under *Pireno*, a practice is not the "business of insurance" unless it: (1) "has the effect of transferring or spreading a policyholder's risk"; (2) "is an integral part of the policy relationship between the insurer and the insured"; and (3) "is limited to entities within the insurance industry." *Id.* at 129. The jurisdictional and injunction statutes meet none of the *Pireno* requirements.

The statutes do not affect the transfer of risk. They are merely procedural provisions with no bearing on ENIC's substantive liability. *See Fragoso*, 991 F.2d at 881-82; *cf. Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987) (arbitration does not affect parties' substantive rights); *Bennett*, 968 F.2d at 972 (same).

Mandating that all actions against an insurance company be brought in state court in the insurance company's domicile also is not an integral part of the policy relationship between insurer

and insured. *See, e.g., Champion Int'l Corp. v. Continental Cas. Co.*, 546 F.2d 502 (2d Cir. 1976) (policyholder action against insurance company for coverage under policy); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D. D.C. 1984) (policyholder action against insurance company for coverage under policy); *see also Federal Trade Comm'n v. Travelers Health Ass'n,* 362 U.S. 293, 302 (1960) (noting the "unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated").

Finally, neither a plaintiff's "practice" of choosing a forum to litigate the debt of a company nor Oklahoma's purported "policy" of consolidating all actions against insolvent domestic insurers in a single state court are limited to entities within the insurance industry. Plaintiffs other than insurance entities regularly select forums -- both before and after disputes arise -- in which to litigate. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (forum selection clause in towing agreement should have been honored). Under the Fifth Circuit's reasoning, all parties -- including non-insurance entities -- are also enjoined and relegated to the state court. In the Fifth Circuit's view, the statutes would preempt an employee's action to establish ENIC's liability under federal law for unlawful discrimination, or a Texas paper company's action to establish that ENIC breached a contract in Texas for the purchase and sale of the paper on which it wrote its Texas policies.

The Fifth Circuit's decision is also at odds with *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979). In *Royal Drug*, this Court held that pharmacy

agreements implementing prescription drug benefits for policyholders were not the "business of insurance" even though policyholders' premiums might ultimately be lowered as a result of cost savings from the agreements. *Id.* This Court held that whatever the exact scope of the term "the business of insurance" it is clear that the focus is "on the relationship between the insurance company and the policyholder." *Id.* at 216. The jurisdictional and injunction statutes are not focused on the relationship between Oklahoma insurance companies and their policyholders. Okla. Stat. tit. 36 §§ 1902, 1904. At best, the policyholder "benefit" is both indirect and highly speculative. The provisions *may* result in cost savings, which if passed along to creditors, *may* result in policyholder-creditors getting a greater distribution.

In *Royal Drug*, however, this Court held that the term "business of insurance" should not be read so broadly that it would encompass any practice intended to minimize costs. In that sense, the "manager of an insurance company is no different from the manager of any enterprise with the responsibility to minimize costs and maximize profits." *Royal Drug*, 440 U.S. at 217; *see also S.E.C. v. National Sec., Inc.*, 393 U.S. 453, 459-60 (1968) (McCarran-Ferguson Act not intended to give states sole authority to regulate all activities of insurance companies, it was only intended to allow states to regulate the business of insurance). A provision requiring all insurance company liquidators to purchase office supplies from a single supplier also might result in cost savings that could be passed along to policyholder-creditors. Such a provision would be a law regulating the business of insurance under the Fifth Circuit's reasoning.

The Fifth Circuit's holding, that laws regulating the manner and court in which a debt can be established are laws regulating the business of insurance if the alleged debtor is an insurance company, conflicts with this Court's holdings on the scope of the McCarran-Ferguson Act and will tend to cause confusion regarding the scope of state power to regulate insurance companies.

C. The Fifth Circuit's Reasoning Is Fundamentally Inconsistent With This Court's Decisions Regarding the Purpose and Goals of the FAA

The Fifth Circuit's decision that the FAA conflicts with the OUILA is premised on its assumptions that: (i) creditors who were policyholders will receive the benefit if an insolvent insurer saves administrative expenses;[13] and (ii) litigating all disputes against an insolvent insurer in a single state proceeding instead of ordering arbitrable disputes arbitrated, will save administrative expenses. (*See* App. 18a-19a.) Even if the first assumption were valid, there is a fundamental inconsistency

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[13] Policyholder claims against insolvent insurers often are paid, fully or partially depending on the amount of the claim, by state insurance guaranty funds. When needed, a guaranty fund will assess its members – financially sound insurers authorized to conduct business in the state – a percentage of applicable premiums to fund the payments. *See Best's Insurance Reports, Property-Casualty United States,* Vol. II: K-Z, at A2 (1997). Thus, although the solvent insurer members might benefit if the liquidator saves administrative expenses, whether policyholders will benefit from such savings is entirely speculative.

between this Court's FAA cases and the Fifth Circuit's assumption that divesting federal courts of the power to enforce arbitration agreements will save administrative expenses.

This Court often has recognized that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural law to the contrary." *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA was enacted to overrule longstanding judicial hostility toward arbitration and to encourage arbitration as a way to resolve disputes efficiently and quickly. *E.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Indeed, the hallmarks of arbitration are its "adaptability and access to expertise." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). The proceedings are streamlined and the results are generally obtained expeditiously. *Id.* The typical reason parties choose arbitration is their desire to keep the effort and expense of resolving disputes manageable. *Id.*; Barger & Quinn, *supra*, at 235; Binning & Moll, *supra*, at 957. These goals are compatible with a desire to conserve the assets of an insolvent insurer.

The Fifth Circuit's suggestion that Petitioners simply may file a petition in state court to compel arbitration (App. 22a n.5, 26a), is also inconsistent with this Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). In *Quackenbush*, this Court held that, under *Burford*, the federal court could not remand a dispute between a reinsurer and an insolvent California insurer to the state court. *Id.* at 731. As in this case, the reinsurer had moved the federal court to compel arbitration under the FAA. *Id.* at 728-29. California had placed

the insurer into liquidation under a comprehensive liquidation act like Oklahoma's. *See* Petitioner's Brief ("*Quackenbush* Br.") at 3-4, in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706. The liquidator claimed that the underlying proceedings were *in rem* or *quasi in rem*, and that by enacting the McCarran-Ferguson Act, Congress mandated that the insurance industry would be a "state enclave." *Quackenbush* Br. at 4.

In *Quackenbush*, the state court assumed "sole and exclusive" jurisdiction over all estate assets (including reinsurance recoverables), and enjoined all proceedings against the liquidator. *Quackenbush* Br. at 8-9 & n.19-20. Quackenbush argued that the states had the paramount interest in regulating the business of insurance under the McCarran-Ferguson Act, and remanding the petition would not put the reinsurers "out of court" because they could still pursue their arbitration claims in state court. *Quackenbush* Br. at 24-25.

This Court did not address Quackenbush's arguments regarding the McCarran-Ferguson Act directly, but it did address the significant federal policy embodied in the FAA, noting:

> [T]he federal interests in this case are pronounced, as [the reinsurer's] motion [against the liquidator of an insolvent insurer] to compel arbitration under the [FAA] implicates a substantial federal concern for the enforcement of arbitration agreements.

Quackenbush, 517 U.S. at 728-29. Further, this Court implicitly recognized that not all disputes involving insolvent insurance companies are matters of substantial state concern.

See id. at 729. Finally, this Court rejected the liquidator's claim that a remand to the state court would not put the reinsurers out of court, stating that "out of court" meant out of federal court. *Id.* at 714. Like the reinsurers in *Quackenbush*, Petitioners should not be put out of federal court and relegated to the Oklahoma state court to enforce their federal right to arbitrate.

This case implicates the substantial federal policy favoring enforcement of arbitration agreements reflected in *Quackenbush* and this Court's other FAA decisions. The Fifth Circuit's assumption that arbitration will waste assets that would be conserved in liquidation, cannot be reconciled with this Court's pronouncements regarding the FAA.

II. THE FIFTH CIRCUIT'S DECISION THAT STATE COURTS CAN ENJOIN *IN PERSONAM* ACTIONS IN FEDERAL COURT, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT

A. The Fifth Circuit's Decision Conflicts With Decisions of Other Circuits

Review by this Court is also warranted because the Fifth Circuit's conclusion that anti-suit injunctions in state insurer liquidation orders are binding on federal courts, conflicts with decisions of the First and Eighth Circuits.

In *Murff v. Professional Medical Insurance Co.*, 97 F.3d 289 (8th Cir. 1996), the Missouri court's order placing the insurer into liquidation contained an anti-suit injunction similar to the injunction in ENIC's liquidation order. *Id.* at 290. While the

OUILA is permissive, i.e., the liquidation court *may* enjoin actions interfering with the delinquency proceeding, Missouri's insolvency act contains a self-executing injunction statute, which provides that no existing action can be maintained outside the liquidation court after a liquidation order is issued and that all existing actions will be converted to claims in the liquidation court. *Id.*; *see also* Mo. Rev. Stat. § 375.1188(1). The Eighth Circuit's conclusion that state courts cannot enjoin federal court actions, *Murff*, 97 F.3d at 290 n.2, squarely conflicts with the Fifth Circuit's conclusion that state courts can do so (App. 24a-25a).

This aspect of the Fifth Circuit's decision also squarely conflicts with the First Circuit's opposite conclusion in *Fragoso*. In *Fragoso*, the state court ordered all proceedings against an insolvent insurer stayed and all claims against the insurer remitted to the state court. *Fragoso*, 991 F.2d at 880. Notwithstanding an injunction statute similar to OUILA, the First Circuit held that the liquidation order injunction was not binding on the federal court because a state court cannot enjoin federal proceedings. *Id.* at 882.

B. The Fifth Circuit's Decision Conflicts With This Court's Prior Decisions on State Court Anti-Suit Injunctions

The Fifth Circuit's conclusion that a state court anti-suit injunction bars *in personam* federal court proceedings contravenes this Court's prior rulings. This Court has expressly held that:

> [S]tate courts are *completely without power* to restrain federal court proceedings in in personam actions . . . And it does not matter that the prohibition . . . [is] addressed to the parties rather than to the federal court itself.

Donovan v. Dallas, 377 U.S. 408, 413 (1964) (emphasis added); *see also Moses H. Cone*, 460 U.S. at 21 n. 24 ("Of course, we do not mean to say that the state court's injunction could properly have been applied to prevent [the] filing [of] a federal lawsuit."); *General Atomic Co. v. Felter*, 434 U.S. 12, 18-19 (1977) (state courts may not restrict the right to pursue federal remedies and take advantage of federal procedures under the FAA).

The Fifth Circuit's decision "that the FAA is reverse pre-empted under the McCarran-Ferguson Act, thereby leaving the district court without the power to compel arbitration in this case" (App. 26a) achieved the very result that the court of appeals expressly stated it did not reach -- "that Oklahoma law divested the district court of its diversity jurisdiction" (App. 25a). As there is no "federal question" jurisdiction under the FAA, the power of the district court to compel arbitration under the FAA is derived from its diversity jurisdiction, *see* U.S. Const. art. III, § 2, cl. 1; 28 U.S.C.A. § 1332(a) (West 1993 & Supp.); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 13 *Federal Practice and Procedure* § 3521 (1984).

Further, the Fifth Circuit's decision suggests that, in enacting the McCarran-Ferguson Act, Congress created an "insurance bankruptcy" type power in the states to enjoin *in personam* actions in the district court, where a federal remedy conflicts with state laws regulating the business of insurance. (*See* App.

24a-25a.) Thus, under the Fifth Circuit's reasoning, Congress implicitly relaxed the well-settled rule, announced in *Donovan* and its progeny, that state courts are without the power to enjoin *in personam* actions in federal court. The effect of the Fifth Circuit's decision is to divest the federal court of its diversity jurisdiction. Because these are important issues of federalism, with national and international import, this Court's review of the Fifth Circuit's decision is warranted.

III. IF NOT REVIEWED, THE FIFTH CIRCUIT'S DECISION WILL CAUSE CONFUSION AND MISUNDERSTANDING IN THE LAW

Unless reviewed by this Court, the Fifth Circuit's decision will cause confusion and misunderstanding in the law regarding whether state procedural laws reverse preempt federal laws under the McCarran-Ferguson Act. The Fifth Circuit's decision creates confusion as to whether a federal law invalidates, impairs, or supersedes a state law for McCarran-Ferguson Act purposes, if the federal and state laws achieve the same goal by different means. The decision also creates confusion as to whether procedural laws regulating the forum in which litigants can commence an action are laws regulating the "business" of insurance if an insurance company is a party to the action. Finally, unless reviewed, the decision will lead to confusion regarding whether a State can prohibit citizens of other states from commencing or maintaining actions in federal court against the state's domestic insurance companies and can instead require all such actions -- by state residents and nonresidents alike -- be brought in a state court in the insurance company's home state.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10302

MUNICH AMERICAN REINSURANCE COMPANY;
NAC REINSURANCE CORPORATION,

Plaintiffs-Appellants,

versus

JOHN P. CRAWFORD, Insurance Commissioner
of the State of Oklahoma, as Receiver of
Employers National Insurance Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

June 2, 1998

Before JOLLY, DUHÉ, and PARKER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge

The dispute in this appeal is about who will decide the entitlement to a $1.5 million pile of money--arbitrators pursuant to the Federal Arbitration Act (the "FAA"), or the Oklahoma state insurance regulators and courts under the McCarran-Ferguson Act. Or, perhaps, the more specific question is who gets to decide who will decide the entitlement question--the federal courts or the state courts. There are, however, several questions we must address before we reach the ultimate disposition of this appeal. The first question is one of jurisdiction: whether the district court had jurisdiction to reconsider its initial order compelling arbitration of the dispute. We next consider whether the district court correctly invoked the *Burford* abstention doctrine to dismiss the action to compel arbitration. Finally, we consider whether state laws governing insurance company delinquency proceedings reverse pre-empt the FAA under the McCarran-Ferguson Act. Although we hold that *Burford* abstention was improper, we conclude that jurisdiction was proper, that the FAA was reverse pre-empted by Oklahoma law under the McCarran-Ferguson Act, and that this dispute is one for the State of Oklahoma to resolve. We, accordingly, affirm the district court's dismissal of the petition to compel arbitration.

I

On January 1, 1986, Employers National Insurance Corporation ("ENIC") and its parent corporation, Employers Casualty Company ("ECC"), entered into reinsurance agreements with Munich American Reinsurance Company

("Munich") and NAC Reinsurance Corporation ("NAC"). Munich and NAC entered into reinsurance agreements with ECC and ENIC to cover ENIC's potential losses under a prior insurance contract (the "umbrella policy") issued by ENIC to Jobs Building Services, Inc. ("Jobs"). Under the reinsurance agreements, Munich and NAC agreed to insure ENIC for a percentage of the net loss on claims paid by ENIC under the umbrella policy. "Net loss" was defined as "all payments by [ENIC] in settlement of claims or losses, payment or benefits, or satisfaction of judgments or awards, after deduction of salvage." "Salvage" was in turn defined as "any recovery made by [ENIC] in connection with a claim or loss, less all expenses paid by [ENIC], other than payments to any salaried employee of [ENIC] making such recovery."

In 1991, ENIC paid $2,065,000 under the umbrella policy to settle a wrongful death action against Jobs. Munich and NAC maintain that ENIC submitted the claim and that each reinsurer paid $829,250 on the reinsurance agreements. ENIC later brought an action in Texas against the underlying insurer in the Jobs wrongful death suit. The case was settled for $2.5 million following an unsuccessful appeal.

On February 14, 1994, prior to the time that the settlement was entered, an Oklahoma state court placed ENIC into liquidation.[1] John R. Crawford, the Insurance Commissioner of Oklahoma, was appointed ENIC's receiver for the ensuing

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[1] ECC had also been placed in receivership by its state insurance commissioner.

delinquency proceedings. The court's liquidation order authorized and directed Crawford to take all actions necessary and appropriate to accomplish ENIC's liquidation in accordance with the Oklahoma Uniform Insurers Liquidation Act. The order vested Crawford with title to all property of ENIC and directed him to take immediate and exclusive possession of such property wherever located or thereafter discovered. It also enjoined any action against ENIC, Crawford, or any of ENIC's assets.

Consistent with the liquidation order, ENIC's attorneys remitted to Crawford $1.5 million from settlement of the wrongful death action, net of attorneys fees. Munich and NAC contacted Crawford, asserting a vested property right in the proceeds. They urged that these proceeds, as salvage under the reinsurance agreements, were not part of the ENIC estate, but being held in trust for them. Crawford insisted that the proceeds were not salvage because, based on ENIC's books and records, ENIC never sought or received reimbursement from Munich, NAC, or ECC for the underlying claims. When Crawford refused to remit the money, Munich and NAC requested that he submit the dispute to arbitration as called for by the reinsurance agreements. Crawford again refused.

Finally, on July 18, 1996, Munich and NAC filed a petition in federal district court to compel arbitration under the FAA, 9 U.S.C. § 4. On September 18, 1996, the district court entered an order finding that ENIC was a party to the reinsurance agreements and compelling the parties to submit the dispute to arbitration. Crawford moved for a new trial, a rehearing, or an amendment to the judgment under Rule 59(e) of the Federal

Rules of Civil Procedure. It was on this motion that the district court first learned of the state court injunction. On October 8, 1996, the district court denied Crawford's motion, noting, however, that principles of comity and federalism required the state court to interpret and enforce its injunction with the appropriate contempt order if necessary. As a result, Crawford filed a motion in state court seeking specifically to enjoin the federal arbitration order and to find Munich and NAC in contempt for violating the previous injunction. Munich and NAC responded with a motion in the federal district court for an injunction forcing Crawford to comply with the arbitration order.

On November 14, 1996, the district court denied Munich's and NAC's motion. The court also took the opportunity to clarify its earlier order, stating:

> [W]hether Petitioners violated the state court injunction by filing this action is a matter for the state court to determine. If the state court determines that the filing of this action violated its injunction, this Court will respect that decision by vacating the arbitration order and dismissing the case. Except in exceptional circumstances, it is the policy of this Court to refrain from interfering with an ongoing state court proceeding.

Accordingly, the district court directed Crawford to file a motion to dismiss the instant action if the state court determined that its injunction had been violated. On January 13, 1997, the state court found that Munich and NAC had violated the injunction issued at the outset of ENIC's delinquency

proceedings by petitioning the federal district court to compel arbitration.

Pursuant to the district court's November 14 order, Crawford filed a motion to dismiss the action to compel arbitration. Munich and NAC argued that abstention was inappropriate in this case and that Crawford was estopped from asserting this issue by his delay in raising it. Crawford responded that the FAA was reverse pre-empted by the McCarran-Ferguson Act and that abstention was therefore appropriate. In the event dismissal was not appropriate, Crawford also requested a stay of the district court proceedings. On February 27, 1997, the district court granted Crawford's motion to dismiss under the *Burford* abstention doctrine. Munich and NAC appeal.

II

Munich and NAC first contend that the district court lacked jurisdiction to reconsider its October 8 order denying Crawford's Rule 59(e) motion because Crawford did not timely appeal or otherwise challenge that order. Crawford responds that in cases where *Burford* abstention is appropriate, it can be ordered at any time, even on appeal. Although we agree with Crawford that *Burford* abstention may be raised at any time, *see Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249, 255 (5th Cir. 1990), we ultimately conclude, as explained below, that *Burford* abstention was inappropriate in this case. Nevertheless, based upon our review of the district court's orders, we are confident that the district court maintained jurisdiction to issue the abstention order.

The district court's October 8 order reflects its intention to retain jurisdiction over the case until the state court resolved the injunction issue. In the October 8 order, the district court denied the Rule 59(e) motion, but altered the finality of its earlier judgment by effectively reserving the right to revisit that judgment pursuant to appropriate state court action. Having now been informed of the state court injunction, the district court concluded that principles of comity and federalism prevented it from interfering with ongoing state court proceedings and that the state court should enforce its own injunction, citing *Trainor v. Hernandez*, 431 U.S. 434 (1977), and *Younger v. Harris*, 401 U.S. 37 (1971). This language evinces the district court's intent to make its September 18 order compelling arbitration conditional pending the state court's resolution of the scope and effect of its injunction.

Our conclusion in this respect is confirmed by the November 14 order, which merely clarified the district court's already-stated position. The November 14 order came as a result of a petition *by Munich and NAC*--not a tardy motion by Crawford or a *sua sponte* reconsideration by the district court--to enforce what they apparently believed was a final order compelling arbitration. As the district court explained, however, "[a]fter considering the [petition], the Court is of the opinion that it should be denied and that the Court's position regarding a previous state court injunction should be clarified." The petition prompted the district court to make explicit what it thought was clear in its October 8 order, namely, that if the state court's injunction had been violated, the district court would respect that decision by vacating the arbitration order and dismissing the case. Thus, when the court finally abstained and

dismissed this action on February 27, 1997, it was in compliance with and in fulfillment of its previous orders. For these reasons, we conclude that the district court had not relinquished jurisdiction over this matter when it compelled arbitration on September 18.

Because the district court's order of abstention and dismissal is a final order disposing of all issues pending in the federal suit between the present parties, we have jurisdiction to hear this appeal under 28 U.S.C. § 1291. *See Clark v. Fitzgibbons*, 105 F.3d 1049, 1051 (5th Cir. 1997). We review the district court's decision to abstain for abuse of discretion, taking care to ensure that the decision fits within the specific limits prescribed by the particular abstention doctrine involved. *Id.*

III

Munich and NAC contend that the district court erred by invoking *Burford* abstention and dismissing the present action because the FAA does not vest the district court with discretion to deny arbitration, which is a prerequisite to *Burford* abstention. They further contend that, even if the *Burford* abstention doctrine were available in this case, arbitration of the dispute between Munich, NAC, and Crawford would not unnecessarily interfere with ENIC's ongoing state court delinquency proceedings, thus, making *Burford* abstention inappropriate. Crawford, on the other hand, argues that the district court had no power to compel arbitration because, to the extent the FAA impedes Oklahoma's efforts in regulating the business of insurance and the liquidation of insurance

companies, it is reverse pre-empted by the McCarran-Ferguson Act.

A

We first consider whether the district court properly invoked the *Burford* abstention doctrine to dismiss the reinsurers' petition to compel arbitration. *Burford* abstention is appropriate in two circumstances: (1) cases involving difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case, or (2) where federal adjudication of the case would disrupt state efforts to establish a coherent policy with respect to matters of substantial public importance. *See New Orleans Public Serv., Inc. v. Counsel of City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*"). Furthermore, it is true, as argued by Munich and NAC, that *Burford* abstention is permissible only when the district court has discretion to grant or deny relief. *See Quackenbush v. Allstate Ins. Co.*, 116 S.Ct. 1712, 1721-22 (1996).[2]

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[2] Prior to *Quackenbush*, we and other courts had consistently approved *Burford* abstention in actions against an insurance company involved in ongoing state delinquency proceedings. *See, e.g., Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529 (5th Cir. 1992); *Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249 (5th Cir. 1990); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *Lac D' Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d

(continued...)

Here, the relief Munich and NAC sought from the district court was neither equitable nor otherwise committed to its discretion. Munich and NAC petitioned the district court under the FAA for a determination that their dispute with Crawford was subject to an arbitration clause and for an order compelling the parties to submit the matter for arbitration. The FAA provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3 & 4). Having determined that the reinsurance agreements contained valid and binding arbitration clauses, the district court had no discretion under the FAA to deny Munich and NAC their right to an order compelling arbitration, at least as to an interpretation of the rights and remedies provided under

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[2] (...continued)
1033 (3d Cir. 1988); *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988). Moreover, these cases upheld *Burford* abstention in such actions without regard for the type of relief being sought in federal court. *See, e.g., Wolfson*, 51 F.3d at 147; *Lac D' Amiante*, 864 F.2d at 1044.

the reinsurance agreements. The district court, therefore, abused its discretion in invoking *Burford* abstention in this case.[3]

B

The question remains, then, whether dismissal was nonetheless required because, as Crawford contends, the FAA is reverse pre-empted by the McCarran-Ferguson Act.[4] Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1101, *et seq.*, for the specific purpose of consigning to the States broad and primary responsibility for regulating the insurance industry. *See SEC v. National Sec., Inc.*, 393 U.S. 453, 458 (1969); *Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531 (5th Cir. 1992). In relevant part, the Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

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[3] We do not reach the question whether, if arbitrators were to determine that the nature of the relief Munich and NAC seek in the underlying claim is equitable, the district court may abstain from enforcing the award.

[4] Munich and NAC argue that *Quackenbush* disposes of this case in Munich's favor. That case, however, never addressed the McCarran-Ferguson Act. Nor does it appear that the lower courts ever considered the applicability of the McCarran-Ferguson Act or that the parties even raised the issue in *Quackenbush*. *See Garamendi v. Allstate Ins. Co.*, 47 F.3d 350 (9th Cir. 1995).

> purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). Ordinarily, federal law pre-empts conflicting state law by virtue of the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. The McCarran-Ferguson Act reverses that effect in the narrow range of cases involving state regulation of the insurance industry.

By its terms, the Act permits a state law to reverse pre-empt a federal statute only if: (1) the federal statute does not specifically relate to the "business of insurance," (2) the state law was enacted for the "purpose of regulating the business of insurance," and (3) the federal statute operates to "invalidate, impair, or supersede" the state law. There is no question that the FAA does not relate specifically to the business of insurance. Thus, we need only address the last two requirements.

(1)

The category of laws enacted "for the purpose of regulating the business of insurance" is broad and consists of those laws "that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *United States Treasury Depot v. Fabe*, 508 U.S. 491, 505 (1993) (quoting *Black's Law Dictionary* 1236, 1286 (6th ed. 1990)). Statutes that focus on protecting the relationship between the insurer and insured are laws regulating the business of insurance. *Id.* at 501. The three criteria relevant in determining whether a regulated practice properly involves the relationship between the insurer and insured include whether: (1) the practice has the effect of

transferring or spreading a policyholder's risk; (2) the practice is an integral part of the policy relationship between the insurer and the insured; and (3) the practice is limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Perino*, 458 U.S. 119, 129 (1982). None of these criteria is dispositive. *Id.*

(a)

In this case, the Oklahoma laws in question are the provisions of the Oklahoma Uniform Insurers Liquidation Act ("OUILA"), which regulate delinquency proceedings in connection with insolvent insurance companies. *See* 36 Okl. St. Ann. § 1901, *et seq.* When an Oklahoma insurance company is declared insolvent and placed into state delinquency proceedings by the state insurance commissioner, the district court of Oklahoma County is vested with "exclusive original jurisdiction" over all delinquency proceedings. *See* §§ 1903 & 1902(A). These proceedings are intended to be "the sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving" the insurance company. § 1902(B). The insurance commissioner, as receiver of the estate, is directed to take immediate possession of all of the insurance company's assets and is "vested by operation of law with title to all of the property, contracts, and rights of action . . . of the insurer, wherever located." §§ 1914(A) & (B). To assure orderly disposition of these assets and management of the company's affairs, OUILA further provides comprehensive procedures for the resolution and prioritization of claims against the company. *See* §§ 1903-20.

OUILA also provides Oklahoma courts with broad powers to enforce the provisions governing delinquency proceedings, such as the power to make "all necessary and proper orders to carry out the purposes of [OUILA]." *See* § 1902(A). Once delinquency proceedings have commenced, the court may issue an injunction to prevent interference with the receiver, waste of the insurer's assets, or the "commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof." § 1904(B). The Oklahoma court in this case issued just such an injunction, precluding Munich from commencing or prosecuting the FAA action in federal district court. The existence of this injunction later served as the basis for the district court's decision to dismiss Munich's FAA petition.

(b)

Crawford argues that OUILA serves the purpose of regulating the business of insurance and, therefore, falls within the scope of the McCarran-Ferguson Act. His position draws substantial support from the Second Circuit's decision in *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995). On facts that run parallel to those in this case, the Second Circuit held that the Kentucky Liquidation Act reverse pre-empted the FAA by operation of the McCarran-Ferguson Act. *See id.* at 45. Kentucky had enacted a comprehensive scheme for the liquidation of insolvent insurance companies, including a provision nullifying the effect of arbitration clauses against the receiver. The appellees, reinsurance companies seeking to compel arbitration regarding their rights of setoff

under the reinsurance agreements, argued that the anti-arbitration provision was not enacted to protect policyholders and deprived them of their bargained-for right to arbitration. *See id.* The Second Circuit refused to limit its focus to the anti-arbitration provision, but instead, examined the Kentucky Liquidation Act as a whole. It concluded that the Act protected policyholders "by assuring that an insolvent insurer will be liquidated in an orderly and predictable manner and the anti-arbitration provision is simply one piece of that mechanism." *Id.*

Like Kentucky, Oklahoma "has formulated a complex and comprehensive scheme of insurance regulation which contains the Uniform Insurers Liquidation Act for the liquidation of an insolvent insurer." *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 705 (10th Cir. 1988) (ordering *Burford* abstention in case against insurance company involved in delinquency proceedings in Oklahoma state court). It, like most States, enacted these laws under the shield provided by the McCarran-Ferguson Act. *Cf., e.g., Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 426 (7th Cir. 1990) (Illinois law); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43 (2d Cir. 1986) (New York law). Oklahoma courts, whom we must recognize in our federal system as the primary expositors of Oklahoma law and public policy, have expressly declared that "Oklahoma's Uniform Insurers Liquidation Act is designed to protect the public in general, and *policyholders of an insolvent insurer in particular*." *Cockrell v. Grimes*, 740 P.2d 746, 749 (Okl. Ct. App. 1987) (emphasis added); *accord Motor Club of Am. v. Weatherford*, 841 F. Supp. 610, 618 (D.N.J. 1994) ("[OUILA's] breadth reflects the need to fully protect the

insolvent insurer's policyholders, who are generally unfamiliar with the financial condition of the insurer and rely on state regulation to ensure that the promise of payment on their insurance policies at some future date will come to fruition.").

Furthermore, at least two of the three *Perino* factors suggest that this comprehensive regulatory scheme, viewed in its entirety, regulates the business of insurance. First, it is crucial to the relationship between the insurance company and its policyholders for both parties to know that, in the event of insolvency, the insurance company will be liquidated in an organized fashion. *See Stephens*, 66 F.3d at 44-45; *Lac D' Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1041 n.9 (3d Cir. 1988); *Blackhawk Heating & Plumbing Co. v. Geeslin*, 530 F.2d 154, 159-60 (7th Cir. 1976). Second, OUILA is limited to entities in the insurance industry. It does not apply to insolvent companies generally, but only to insolvent insurance companies. *See* 36 Okl. Stat. Ann. §§ 1901-1903. In short, "[r]ecognition by this Court of the effectuation of the liquidation of [ENIC] by the State of [Oklahoma] is in accordance with federal policy which directs that the control over the insurance business remain in the hands of the states." *Anshutz v. J. Ray McDermott Co., Inc.*, 642 F.2d 94, 95 (5th Cir. Unit A Mar. 1981) (staying appeal as result of state court injunction restraining interference with ongoing liquidation of insurance company).

(c)

Munich and NAC contend, however, that *Fabe* rejected the notion that we may consider OUILA as a whole in determining

whether it was enacted for the purpose of regulating the business of insurance. *Fabe* indeed offers some support for their position. There, the issue was whether, under the McCarran-Ferguson Act, a federal priority statute was reverse pre-empted by a conflicting Ohio priority statute that was part of a "complex and specialized administrative structure" designed for the regulation of insurance company insolvency. *See* 508 U.S. at 493-94. The Ohio statute provided sequential priority for (1) administrative costs, (2) specified wage claims, (3) policyholders' claims, (4) general creditors' claims, and (5) government claims. *See id.* at 495. The federal statute gave the federal government first priority. *See id.* Examining each priority provision of the Ohio statute separately, the Court held that the priorities for administrative costs and policyholder claims displaced the federal priority, but that the federal priority trumped all other claims. *See id.* at 509. The Court reasoned that the Ohio statute was enacted for the purpose of regulating the business of insurance to the extent it regulated policyholder interests. *Id.* at 508. But to the extent that the statute was designed to further the interests of other claimants, it did not have such a purpose. *See id.*

Certainly, *Fabe*'s holding and analysis suggest that a statute may require parsing to determine the extent of its pre-emptive power under the McCarran-Ferguson Act. At the same time, however, the Court stopped short of directing that this approach be taken in every case. *See id.* at 509 n.8. *Fabe*'s holding in this respect is simply unclear. *Compare Antonio Garcia v. Island Program Designer, Inc.*, 4 F.3d 57, 61-62 (1st Cir. 1993) (every provision must be parsed), with *Stephens*, 66 F.3d at 45 (statutory scheme may be considered in its entirety).

This uncertainty need not concern us today, however, because even if we are required to parse OUILA, the specific provisions of the statute at issue here--vesting exclusive original jurisdiction of delinquency proceedings in the Oklahoma state court and authorizing the court to enjoin any action interfering with the delinquency proceedings--are laws enacted clearly for the purpose of regulating the business of insurance. These provisions give the state court the power to decide all issues relating to disposition of an insolvent insurance company's assets, including whether any given property is part of the insolvent estate in the first place. Thus, as the Tenth Circuit has recognized, "Oklahoma has not only adopted a comprehensive scheme to oversee the liquidation of insolvent insurers, it has provided a particular court . . . to oversee liquidation proceedings. The effect of this provision grants the Oklahoma County District Court a special relationship of cooperation, technical oversight and concentrated review with the Oklahoma Commissioner of Insurance in the process of liquidating insurers." *Grimes*, 857 F.2d at 705; *see also Lac D' Amiante*, 864 F.2d at 1045 (identifying same interests in New York insolvency proceedings). This special relationship contributes markedly to the orderly liquidation or rehabilitation of the insurance company and the adjudication of claims against it.

Oklahoma's policy of placing ultimate control over all issues relating to the insolvency proceedings in a single court is aimed at protecting the relationship between the insurance company and its policyholders. Insurance companies are ineligible for the protections afforded by the federal Bankruptcy Code, *see* 11 U.S.C. § 109; such protections instead are provided by state laws, which are shielded from federal interference by the

McCarran-Ferguson Act. *Clark*, 105 F.2d at 1051; *see also Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 147 (8th Cir. 1995). The experience of the federal bankruptcy courts, which evidences the importance of consolidating all of the assets of an insolvent company and the claims against those assets in a single forum, supports the legitimacy of the Oklahoma scheme in protecting the interests of policyholders. *See Levy v. Lewis*, 635 F.2d 960, 964 (2d Cir. 1980). In addition to the interests served by orderly adjudication of claims, which we have already discussed, consolidation prevents the unnecessary and wasteful dissipation of the insolvent company's funds that would occur if the receiver had to defend unconnected suits in different forums across the country. *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157, 157 (1st Cir. 1991) (per curiam); *Lac D' Amiante*, 864 F.2d at 1045. Consolidation also eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders, who are often relying on policies with the same or similar provisions. *See Gonzalez*, 946 F.2d at 157; *Lac D' Amiante*, 864 F.2d at 1047 n.16; *cf. also Martin*, 910 F.2d at 253-54 (approving *Burford* abstention to avoid risk of inconsistent adjudications). Thus, consolidation, enforced through injunctions, conserves the insurance company's assets for ultimate payment to policyholders as well as other creditors. *See Anshutz*, 642 F.2d at 95 (approving of injunctions by state receivership courts to consolidate claims against insolvent insurance companies); *U.S. Fin. Corp. v. Warfield*, 839 F. Supp. 684, 689 (D. Ariz. 1993).

Munich and NAC counter that the OUILA provisions requiring consolidation benefit all creditors in addition to policyholders and, therefore, should not be considered under *Fabe* as enacted for the purpose of regulating the business of insurance. We disagree. The Court in *Fabe* found that the Ohio provision granting a preference to expenses in administering delinquency proceedings was enacted for the purpose of regulating the business of insurance because it was "reasonably necessary" to further the goal of protecting policyholders. *See* 508 U.S. at 509. The Court reasoned that "[w]ithout payment of administrative costs, liquidation could not even commence." *Id.* Surely, the ability of a state and receiver to administer delinquency proceedings inures to the benefit of all creditors, not just policyholders. But this fact alone did not alter the insurance-related character of the Ohio provision in *Fabe*. As the Court explained in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969), "[s]tatutes aimed at protecting this relationship [between an insurance company and its policyholders], directly or *indirectly* are laws regulating the 'business of insurance.'" *Id.* at 460 (emphasis added), *quoted in Fabe*, 508 U.S. at 501.

The same logic applies to the provisions of OUILA requiring consolidation of all claims related to the delinquency proceedings in Oklahoma state court. For the many reasons we have just identified, these laws are reasonably necessary to further the goal of protecting policyholders, even though they may also benefit other creditors. Some of these benefits fall more directly on policyholders than others, but none are insignificant or attenuated. In these respects, the provisions of OUILA at issue here are indistinguishable from the Ohio provision giving a preference to administrative expenses in

Fabe. Thus, we hold that these provisions were enacted for the purpose of regulating the business of insurance.

(2)

We must next consider whether the FAA operates to "invalidate, supersede, or impair" OUILA--specifically those provisions vesting exclusive original jurisdiction of delinquency proceedings in Oklahoma state court and authorizing the court to enjoin any action interfering with the insolvency proceedings. Munich and NAC contend that arbitration of their dispute with Crawford would not in any way interfere with the delinquency proceedings in Oklahoma state court. They maintain that if they have a vested property right to the settlement funds as salvage under the reinsurance agreements, the funds were never an asset of the insolvent estate, and ENIC's creditors never had a right to any portion of the funds. Thus, they argue, this dispute is not within the scope of the delinquency proceedings committed to the exclusive jurisdiction of the Oklahoma state court, and arbitration of the dispute presents no conflicts with Oklahoma law. Alternatively, they assert that if they have only a nonvested interest in damages for breach of contract, they would merely acquire a judgment lien and be forced to stand in line with the rest of ENIC's creditors. This result, they contend, is contemplated by OUILA itself.

Munich and NAC maintain, and we agree, that whether they have a vested property interest or nonvested contractual interest in the settlement proceeds is a question committed to arbitration

under the reinsurance agreements.[5] We shall not, in resolving this appeal, make our own interpretation of the agreements and thereby deny the parties their right to have this issue ultimately decided in arbitration. *Cf. Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603 (5th Cir. 1995) (refusing to address dispute committed to arbitration until final award entered, despite acknowledged failings of arbitration process). Nor need we, because neither alternative leads us to the conclusion that the district court had the power to compel arbitration under the FAA.[6]

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[5] Munich and NAC argue that the existence of the Oklahoma Arbitration Act, which upholds the enforceability of arbitration clauses in contracts between insurance companies, *see* 15 Okl. Stat. Ann. § 802, suggests that arbitration under the FAA presents no conflict with Oklahoma law. We disagree. The Oklahoma Arbitration Act makes no reference to arbitration of disputes with an insurance company in delinquency proceedings. Moreover, we do not hold in this opinion that Munich and NAC have no right to arbitration; we only hold that the district court had no authority to compel it under the FAA. The Oklahoma state court might well decide to order arbitration of this dispute.

[6] We note at the outset that Munich and NAC invite us to adopt the approach taken by the Ninth Circuit in *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972 (9th Cir. 1992). There, in a case very similar to the instant case, the Ninth Circuit rejected a receiver's argument that state insurance insolvency laws were impaired by having the dispute arbitrated under the FAA. *See id.* at 972-73. The court reasoned that "[o]nly if a court or arbitrator determines that the

(continued...)

Regardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the receivership court nevertheless conflicts with the Oklahoma law giving the state court the power to enjoin any action interfering with the delinquency proceedings. Under section 1904(B) of OUILA, a

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[6] (...continued)
funds belong to [the insolvent company] does that money become part of the estate that the liquidator will distribute" and does the receiver's authority vest. *See id.* at 972. We decline the invitation to follow *Bennett*, however, because it contravenes the well established rule, applicable to both federal and state courts, that if two competing actions are *in rem* or *quasi in rem*, the court first assuming jurisdiction over the property in question exercises that jurisdiction to the exclusion of the other. *See Penn Gen. Cas. Co. v. Commonwealth of Pennsylvania* ex rel. *Schnader*, 294 U.S. 189, 195 (1935).

To the extent Munich and NAC, like the petitioner in *Bennett*, claim a vested property interest in identifiable proceeds and seek an adjudication of ownership in those proceeds, the nature of their action is *quasi in rem*. *See Shaffer v. Heitner*, 433 U.S. 186, 199 n.17 (1977); *Carney v. Sanders*, 381 F.2d 300, 302-03 (5th Cir. 1967). Likewise, the delinquency proceedings in Oklahoma state court are *in rem* or *quasi in rem* proceedings. *See H.H. Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980), *cert. denied*, 450 U.S. 1026 (1981); *Geeslin*, 530 F.2d at 158. Because the Oklahoma state court first obtained jurisdiction over the proceeds in question, it alone has the power to determine ownership of those funds. *See United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477-79 (1936) (federal court has no jurisdiction to decide in rem action for property involved in ongoing state court insurance company liquidation proceedings).

provision with breadth similar to sections 105 and 362 of the federal bankruptcy code, *see* 11 U.S.C. §§ 105 & 362, the state court is authorized to issue any injunction "deemed necessary to prevent interference with the Insurance Commissioner or the proceedings, or . . . the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof." The Oklahoma court in this case ordered just such an injunction, precluding Munich and NAC from commencing or prosecuting an action against the receiver, ENIC, or the assets of the insolvent estate. Munich and NAC, however, invoked the FAA to obtain what the state court injunction expressly prohibited--an action against ENIC's receiver to be adjudicated in a forum outside the Oklahoma state court. Although the precise degree to which a state statute may be impaired so as to trigger the McCarran-Ferguson Act is not well-settled, *see Doe v. Norwest Bank of Minnesota*, 107 F.3d 1297, 1307-08 (8th Cir. 1997), we find impairment sufficient to trigger it here.

IV

Finally, Munich and NAC argue that we should disregard the state court injunction in this case because state courts have no power to enjoin parties from pursuing federal remedies in federal court, citing cases such as *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), and *Donovan v. City of Dallas*, 377 U.S. 408 (1964). But none of these cases considered the effect of the McCarran-Ferguson Act or the broad power bestowed on States when acting, as here, pursuant

to a law enacted for the purpose of regulating the business of insurance. Authority to relax the "judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions" remains, of course, with Congress. *See Donovan*, 377 U.S. at 412-13. Congress has evinced a strong federal policy in favor of deferring to state regulation of insolvent insurance companies as reflected in the McCarran-Ferguson Act and the express exclusion of insurance companies from the federal Bankruptcy Code. *See Wolfson*, 51 F.3d at 147. These laws symbolize the public interest in having the States continue to serve their traditional role as the preeminent regulators of insurance in our federal system and indicates the special status of insurance in the realm of state sovereignty. *See Lac D' Amiante*, 864 F.2d at 1045 (citing *Levy v. Lewis*, 635 F.2d 960, 963-64 (2d Cir. 1980)); *Hartford Casualty*, 913 F.2d at 426. The provisions of OUILA vesting the state court with broad injunctive authority to prevent interference with delinquency proceedings grant no more power than that which Congress has deemed necessary to the parallel disposition of bankruptcies in federal court.

We surely are not saying that a State has the power to enjoin a party generally from pursuing federal remedies in federal court. Nor are we saying that Oklahoma law divested the district court of its diversity jurisdiction. *See Martin*, 910 F.2d at 254 (rejecting the argument that McCarran-Ferguson Act removes diversity jurisdiction from federal courts in insurance matters). What we are saying is that, by operation of the McCarran-Ferguson Act, a federal act that permits states to exert broad power over the insurance industry, state laws regulating the business of insurance may suspend federal

remedies based on conflicting federal statutes--here, the FAA. We therefore hold that the FAA is reverse pre-empted under the McCarran-Ferguson Act, thereby leaving the district court without the power to compel arbitration in this case. Munich and NAC, however, remain free to petition the Oklahoma state court for an order compelling arbitration of their dispute with Crawford.

V

In summary, we hold that *Burford* abstention was improper because the district court did not have discretion under the FAA to deny Munich and NAC their right to an order compelling arbitration in this case. We also hold, however, that the provisions of Oklahoma law vesting exclusive original jurisdiction of insurance company delinquency proceedings in Oklahoma receivership court and authorizing the court to enjoin any action interfering with such proceedings are laws enacted for the purpose of regulating the business of insurance and, therefore, fall within the scope of the McCarran-Ferguson Act. As a result, dismissal of the action was required because, by operation of the McCarran-Ferguson Act, the FAA is reverse pre-empted to the extent it permits Munich and NAC to bring an action against assets of a delinquent insurance company in a forum other than the Oklahoma receivership court. For these reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

February 28, 1997 Final Judgment and Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

FINAL JUDGMENT

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered:

It is **ORDERED** and **ADJUDGED** that Respondent's Petition to Compel Arbitration is **dismissed without prejudice.**

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 27 day of February, 1997

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS

Before the Court is the Motion to Dismiss filed by Respondent John P. Crawford. The motion is opposed. After considering the motion, the response, and the reply, the Court is of the opinion that the motion should be granted.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are

binding upon Employers National Insurance Corporation (ENIC). The Court previously granted the petition and directed the parties to commence arbitration proceedings consistent with the terms and provisions of the agreements.

Subsequently, Respondent John R. Crawford filed a motion for reconsideration, which indicated that the initial filing of this action violated an Oklahoma state court injunction entered on February 14, 1994.

This Court denied the motion for reconsideration, but stated that "the state court is the court that should interpret and enforce its injunction. If the state court determines that its injunction has been violated, it may enter the appropriate contempt order." The Court noted that it would respect the decision of the state court and indicated that the parties should be prepared to abide by the state court's decision.

On January 13, 1997, the state court entered its order ruling that the filing of this action violated its injunction. This Court will give the state court injunction full faith and credit and dismiss this action under the *Burford* abstention doctrine. *See Clark v. Fitzgibbons*, ___ F.3d ____ (1997 WL 35404) (5th Cir. Feb. 14, 1997) (*Burford* abstention appropriate under policies of McCarran-Ferguson Act). The Court will not reconsider this ruling.

It is therefore **ORDERED** that the Motion to Dismiss filed by Respondent John P. Crawford, on January 17, 1997, is **granted.**

It is **FURTHER ORDERED** that the Order Granting Petition to Compel Arbitration and Denying Respondent's Motion to Dismiss, filed September 18, 1996, is **vacated.**

It is **FURTHER ORDERED** that this action is **dismissed without prejudice** to refiling in the Oklahoma state court action.

Signed this 27 day of February 1997.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX C

November 14, 1996 Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER DENYING PETITIONERS' APPLICATION
FOR TEMPORARY RESTRAINING ORDER
AND
CLARIFYING COURT'S POSITION REGARDING
STATE COURT CONTEMPT HEARING

Before the Court is the Application for Temporary Restraining Order filed by Petitioners. After considering the application, the Court is of the opinion that it should be denied and that the Court's position regarding a previous state court injunction should be clarified.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are binding upon Employers National Insurance Corporation (ENIC). The Court previously granted the petition and directed the parties to commence arbitration proceedings consistent with the terms and provisions of the agreements.

Subsequently, Respondent John R. Crawford filed a motion for reconsideration, which indicated that the initial filing of this action violated an Oklahoma state court injunction entered on February 14, 1994.

The Court denied the motion for reconsideration, but stated that "the state court is the court that should interpret and enforce its injunction. If the state court determines that its injunction has been violated, it may enter the appropriate contempt order." It appears that a contempt hearing has been set in the Oklahoma state court for November 21, 1996.

With the present application, Petitioners seek a temporary restraining order enjoining the state court from hearing the contempt motion and an order directing the parties to promptly arbitrate the underlying dispute.

This Court will not enjoin the state court hearing and deems it necessary to clarify its previous ruling.

First, whether Petitioners violated the state court injunction by filing this action is a matter for the state court to determine. If the state court determines that the filing of this action violated its injunction, this Court will respect that decision by vacating the arbitration order and dismissing this case. Except in exceptional circumstances, it is the policy of this Court to refrain from interfering with an ongoing state court proceeding. *See, generally, Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 526 (1986); *Middlesex Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 433, 431-32 (1981); *Traynor v. Hernandez* 431 U.S. 434, 442-43 (1977); *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *Younger v. Harris*, 401 U.S. 37 (1971); *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 507-08 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

Second, in the event that the state court determines that the filing of this action violated its injunction, **Crawford is directed to file a motion to dismiss with this Court.** The motion shall be accompanied by copies of the relevant state court papers and state court order. If appropriate, this Court will dismiss this case. This Court will assume that the state court has determined that there has been no violation of its injunction unless the proper motion has been filed by **December 21, 1996**.

Third, in the event that the state court determines that the filing of this action violated its injunction and Petitioners wish

to challenge the validity or scope of the injunction, relief should be sought in the Oklahoma appeals system.

Fourth, should the state court determine that the filing of this action was not in violation of its injunction, this Court considers its determination that Crawford is bound by the arbitration agreement to be final, as the time for appeal of the order compelling arbitration has expired. In this event, **this Court expects the parties to obey its order and arbitrate this dispute.**

Finally, the attorneys for both parties are advised that the Court will impose sanctions upon any attorney who multiplies the proceedings in this case unreasonably and vexatiously, *see* 28 U.S.C. § 1927; *Michael Baulch v. Robert C. Johns,* 70 F.3d 813, 817 (5th Cir. 1995), or fails to comply with the Court's decision in *Dondi Properties Corp. v. Commerce Sav. & Loan Ass*, 121 F.R.D. 284 (N.D. Tex. 1988).

It appears to the Court that both sides may have been playing "hide-the-ball" by failing to disclose the previous state court injunction until after a decision on the merits of the arbitration issue was rendered. If the injunction applies to Petitioners, valuable judicial resources have been wasted deciding, the arbitration issue. The parties should be prepared to abide by the state court's decision.

It is therefore **ORDERED** that the Application for Temporary Restraining Order filed by Petitioners, on November 8, 1996, is **denied.**

It is **FURTHER ORDERED** that the parties are directed to comply with the instructions provided above.

It is **FURTHER ORDERED** that the order directing the parties to arbitration is **stayed** until **December 21, 1996,** unless the Court orders otherwise.

It is **FURTHER ORDERED** that the agreed preliminary injunction previously entered by this Court shall remain in effect to preserve the status quo until further order of this Court.

Signed this 14 day of November, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX D

October 9, 1996 Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER DENYING RESPONDENTS MOTION
FOR NEW TRIAL, REHEARING, OR
TO ALTER OR AMEND JUDGMENT

Before the Court is the Motion for New Trial, Rehearing, or to Alter or Amend Judgment filed by Respondent John R. Crawford. After considering the motion, the Court is of the opinion that it should be denied.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are binding upon Employers National Insurance Corporation (ENIC). The Court previously granted the petition and directed the parties to commence arbitration proceedings consistent with the terms and provisions of the agreements.

With the present motion, Crawford contends that the Court erred in granting the petition by: (1) failing to set a hearing on the petition; (2) determining that the contract at issue was unambiguous; and (3) resolving conflicting issues of fact on summary judgment. Crawford alternatively seeks an order referring the action to the receivership case currently pending in the Oklahoma County District Court pursuant to an injunction entered in that case.

Crawford contends that because neither side moved for summary judgment, the Court violated the notice and hearing provisions of Rule 56. *See Matter of Hailey,* 621 F.2d 169, 171 (5th Cir. 1980). Crawford also contends that the Court cannot grant summary judgment *sua sponte*. *See Estate of Smith v. Tarrant County Hospital District,* 691 F.2d 207, 208 (5th Cir. 1982); *but see Judwin Properties, Inc. v. United States Fire Ins. Co.*, 973 F.2d 432, 436-37 (5th Cir. 1992) (stating that a district court may enter summary judgment *sua sponte* where the party

against whom judgment is entered has an opportunity to present evidence on the issues).

As an initial matter, the Court did not enter judgment in this case, SEE FED. R. CIV. P. 58, nor did it rule on the merits of the underlying dispute. The Court considered the evidence and argument presented in the petition to compel, the motion to dismiss filed by Crawford, and the reply brief, and was "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," and directed the parties to arbitration. 9 U.S.C. § 4; *Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987). The Court is unconvinced that the procedural requirements of Rule 56 apply to a petition to compel arbitration.

In any event, Crawford's argument that it was not on notice that the Court might grant the petition without a hearing is unconvincing, especially in light of its request for dismissal of the petition based on terms and conditions of the agreements and the exhibits and evidence presented in support of its motion.

The petition to compel is accompanied by numerous exhibits and evidence. The motion to dismiss filed by Crawford responds to the petition, contains an argument section, and is accompanied by exhibits and evidence. Crawford states in his motion, "The Petition to Compel Arbitration fails to state a cause of action for the reason that said petition and the exhibits thereto demonstrate that Employers National Insurance Corporation is not a party to the umbrella liability reinsurance agreements." Crawford also argues in his motion that because

the underlying contract is ambiguous, "a question of fact is raised as to whether Munich intended to reinsure the subsidiaries."

Although the Court disagreed with Crawford's position, he was aware that he was required to create a genuine issue of fact before he was entitled to a trial. He also attempted to do so. *See Hamman v. Southwestern Gas Pipeline, Inc.*, 721 F.2d 140, 142 (5th Cir. 1982) (no oral hearing required where party on notice and submitted responsive brief); *Kilbort v. Hampton*, 538 F.2d 90, 91 (5th Cir. 1976) (no oral hearing required).

In any event, the Court has considered the additional evidence and argument in this motion--which provides Crawford with an additional opportunity to be heard--and remains convinced that no genuine issue exists for a trial.

In a similar vain, Crawford contends that 9 U.S.C. § 4 requires that the Court conduct a hearing once it determines that the making of the agreement is in issue. The Court agrees; however, both federal procedural law and the policy driving the arbitration act counsel that the issue must be "genuine" before the Court is required to conduct an evidentiary hearing. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (the policy driving the Arbitration Act demands rigorous enforcement of agreements to arbitrate); *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1982) (Congress' clear intent of the Arbitration Act was to move parties to arbitrable disputes out of court and into arbitration as quickly and as easily as possible); *Garber v. Sir Speedy, Inc.*, 930 F. Supp. 267, 271-72 (N.D. Tex. 1995) (same), *aff'd, 91*

F.3d 137 (5th Cir. 1996); *Anderson,* 477 U.S. at 248 (a dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party).

In this case, the Court determined as a matter of law that the contract was unambiguous and binding on ENIC. There is no genuine dispute, and Crawford is not entitled to a hearing.

Crawford also contends that the Court erred in determining that the contract is unambiguous. He argues that the reinsurance agreements are "reasonably susceptible to being construed as applying only to the Texas subsidiary's, and not to ENIC."

In Texas, whether a contract is ambiguous is a question of law. *Firemans Fund Insurance Co. v. Murchison,* 937 F.2d 204, 207 (5th Cir. 1991). A contract is ambiguous if it is reasonably subject to more than one meaning. *Id.* In construing a contract, the Court must give meaning to each of its provisions, in light of the circumstances surrounding the contract's execution, excluding statements of parties as to what they intended. *Id.*

In this case, the undisputed evidence establishes that the reinsurance contracts are signed by O.V. McDonald on behalf of Employers Casualty Company and its subsidiaries. At the time the agreements were signed, ENIC was a subsidiary of Employers Casualty Company. Both entities were located in the same building in Dallas, Texas, and shared the same telephone number. O.V. McDonald was the vice president and

secretary of ENIC with the apparent authority to bind it under these circumstances. *See General Production Co. v. Black Coral Investments*, 715 S.W.2d 121 (Tex. App.--Houston[14th Dist.] 1986, writ ref'd n.r.e.). Under the undisputed facts and circumstances of this case, the reinsurance agreements are unambiguous and bind ENIC.

In addition, if the Court conducted a trial on the issue it would be a bench trial. Crawford has failed to point any evidence which would lead the Court to find as a matter of fact that ENIC is not bound by the agreement. Conducting a bench trial would be an unnecessary waste of judicial resources and contrary to the policies of the arbitration act.

Finally, Crawford argues that the Court should order the parties to litigate their claims in the Oklahoma receivership court because that court has enjoined all parties who have dealt with ENIC from "[b]ringing, maintaining or further prosecuting any judicial or administrative proceedings against [ENIC] or the Receiver." The Court will not grant this request.

The Court's role in this litigation is limited to determining whether the parties have entered into an agreement to arbitrate. *City of Meridian v. Algernon Blair, Inc.*, 721 F.2d 525, 529 (5th Cir. 1983). The Court has made its determination and its role in this litigation has terminated. Crawford may bring the injunction to the attention of the arbitrator.

Additionally, this Court is of the opinion that the state court is the court that should interpret and enforce its injunction. If the state court determines that its injunction has been violated,

it may enter the appropriate contempt order. To rule otherwise would violate well established principles of comity and federalism and interfere with an ongoing state court proceeding. *See, generally, Parsons Steel, Inc. v. First Alabama Bank, 474 U.S.* 518, 526 (1986); *Traynor v. Hernandez,* 431 U.S. 434, 442-43 (1977); *Mitchum v. Foster,* 407 U.S. 225, 243 (1972); *Younger* v. *Harris,* 401 U.S. 37 (1971).

It is therefore **ORDERED** that the Motion for New Trial, Rehearing, or to Alter or Amend Judgment filed by Respondent John R. Crawford, on October 2, 1996, is **denied**.

Signed this 8th day of October, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX E

September 18, 1996 Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER GRANTING PETITION TO COMPEL
ARBITRATION
AND
DENYING RESPONDENTS' MOTION TO DISMISS

Before the Court is the Petition to Compel Arbitration filed by Munich American Reinsurance Company and NAC Reinsurance Corporation. Also before the Court is the Motion to Dismiss Petition to Compel Arbitration filed by Respondent John R. Crawford, Insurance Commission of the State of Oklahoma, As Receiver of Employers National Insurance Corporation. After considering the petition, the motion, and the record in this case, the Court is of the opinion that the petition should be granted and the motion to dismiss denied.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are binding upon Employers National Insurance Corporation. The sole issue before the Court is whether it has the power to compel Crawford to arbitrate the underlying dispute under the Federal Arbitration Act, 9 U.S.C. § 4. The allegations in the petition demonstrate that the Court has independent jurisdiction over this matter based upon complete diversity of citizenship. 28 U.S.C. § 1332.

Crawford denies that Employers National is a party to the agreements, and requests an evidentiary hearing on the issue.[1] Crawford contends that the agreement is ambiguous because they purport to bind only Employers Casualty Company and its subsidiaries that are located in Dallas, Texas. Crawford

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[1] Assuming for purposes of this motion that Crawford has a right to a jury trial on this issue, he has waived this right by failing to make such a request in either his answer or his motion to dismiss. *See* 9 U.S.C. § 4; *Hamilton Life Ins. Co of New York v. Republic Nat. Life Ins. Co.*, 408 F.2d 606 (2nd Cir. 1969).

contends that Employers National is not located in Dallas. Crawford also contends that the signatory of the agreements was not empowered to bind Employers National.

The policy driving the Arbitration Act demands rigorous enforcement of agreements to arbitrate. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). However, the Court must first determine whether the parties agreed to arbitrate the dispute. *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1984). Whenever the scope of an arbitration clause is in question, the Court construes the clause in favor of arbitration. *United Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *City of Meridian, Miss., v. Algernon Blair, Inc.*, 721 F.2d 525, 527 (5th Cir. 1983). The Court may not look to or decide the merits of the underlying claim, *Id.*, and the restricted nature of the inquiry reflects the congressional policy that parties to an arbitrable dispute move quickly out of court and into arbitration. *See Moses H. Cone Hospital v. Mercury Contr. Corp.*, 460 U.S. 1, 23 (1982).

In this case, Petitioners contend that Crawford is bound by the arbitration clauses contained in Umbrella Liability Reinsurance Agreement CAF 4139 between Munich American and Employers Casualty Company (including subsidiaries), and Umbrella Liability Reinsurance Agreement between North American Company for Property and Casualty Insurance and Employers Casualty Company (including subsidiaries). The agreements are signed by O.V. McDonald on behalf of Employers Casualty Company and its subsidiaries. Petitioners provide uncontroverted evidence that O.V. McDonald was Vice President and Secretary of both Employers Casualty Company

and its subsidiary, Employers National. Petitioners also provide evidence that Employers National was located in Dallas at the time the agreements were signed.

The Court determines that the evidence of record establishes as a matter of law that Employers National signed and is bound by the terms and provisions of the underlying reinsurance contracts. The contract unambiguously states that Employers Casualty Company (and its subsidiaries) are parties to the agreements, and there is no genuine dispute that O.V. McDonald had the power to bind Employers National. The objective intent of the parties is demonstrated by the terms and provisions of the agreement.

Crawford urges the Court to consider extrinsic evidence regarding the subjective intent of the parties. Even were the Court to find that the contract is ambiguous and that it should consider extrinsic evidence, it would find as a matter of fact that Employers National is bound by the terms of the agreement.[2] A review of the extrinsic evidence of record indicates that the subjective intent of the parties was to bind Employers Casualty Company and all of its subsidiaries.

---

[2] Because there are no issues of witness credibility, the Court is not required to conduct an evidentiary hearing to determine limited factual questions. *See Matter of Placid Oil Co.*, 832 F.2d 394, 397-398 (5th Cir. 1991) (Where the decision is to be reached by the Court, and there are no issues of witness credibility, the Court may decide limited factual issues on summary judgment).

For example, the Affidavit of H. Wayne Dortch, President and Chief Executive Officer of Employers General Insurance Group, Inc., who participated in the negotiation of the agreements, indicates that the parties intended to bind all of the subsidiaries. Although Crawford provides some evidence that the Oklahoma Insurance Department expressed "concerns" that the subsidiaries should actually be named in the contract, this evidence does not directly contradict the affidavit of Dortch. In any event, the Court determines that the contract is unambiguous regardless of the Oklahoma Insurance Department.

It is therefore **ORDERED** that the Petition to Compel Arbitration filed by Munich American Reinsurance Company and NAC Reinsurance Corporation, on July 18, 1996, is **granted.** The parties are directed to commence arbitration proceedings consistent with the terms and provisions of the underlying reinsurance agreements.

It is **FURTHER ORDERED** that the agreed preliminary injunction previously entered by this Court shall remain in effect subject to modification or dissolution of the arbitrator.

It is **FURTHER ORDERED** that the Motion to Dismiss Petition to Compel Arbitration filed by Respondent John R. Crawford, Insurance Commission of the State of Oklahoma, As Receiver Employers National Insurance Corporation, on August 19, 1996, is **denied.**

It is **FURTHER ORDERED** that this action is **administratively closed.** The Court will not reopen the case

except upon properly filed motion to confirm the arbitration award of the arbitrator.

Signed this 17th day of September, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX F

The Constitution of the United States

Article III

Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;-- to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

The Federal Arbitration Act, 9 U.S.C. Section 1 et. seq.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such

application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

APPENDIX H

The McCarran-Ferguson Act, 15 U.S.C. Section 1011 et seq.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1980, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX I

Diversity Jurisdiction
28 U.S.C. Section 1332

§ 1332. Diversity of Citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

* * * *

APPENDIX J

Oklahoma Uniform Insurers Liquidation Act
36 Okla. Stat. Section 1901 et seq.

§ 1901. Definitions

For the purpose of this article:

* * * *

3. "Delinquency proceeding" means any proceeding commenced against an insurer pursuant to this article for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

* * * *

§ 1902. Delinquency proceedings; jurisdiction; venue; nature of remedy; appeal

A. The district court is vested with exclusive original jurisdiction of delinquency proceedings pursuant to the provisions of this article, and is authorized to make all necessary and proper orders to carry out the purposes of this article.

B. The venue of delinquency proceedings against any insurer shall be in Oklahoma County.

C. Delinquency proceedings pursuant to this article shall

constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer. No person other than the Insurance Commissioner, his attorney, or the Attorney General representing the Insurance Commissioner shall appear in the courts of this state requesting the appointment of a receiver or otherwise commence delinquency proceedings to take over, liquidate, rehabilitate, reorganize, or conserve an insurer and no court shall entertain a petition for the commencement of such proceedings unless the same has been filed in the name of the state on the relation of the Insurance Commissioner.

D. An appeal shall lie to the Supreme Court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every other order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein.

§ 1903. Commencement of delinquency proceedings

The Insurance Commissioner shall commence any such proceeding, his attorney or the Attorney General representing him, by an application to the court for an order directing the insurer to show cause why the Insurance Commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers, or the public may require.

§ 1904. Injunctions

A. Upon application by the Insurance Commissioner for such an order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents and all other persons for the transaction of its business or the waste or disposition of its property until the further order of the court.

B. The court may at any time during a proceeding under this article issue such other injunctions or orders as may be deemed necessary to prevent interference with the Insurance Commissioner or the proceedings, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

C. Notwithstanding any other provision of law, no bond shall be required of the Insurance Commissioner as a prerequisite for the issuance of any injunction or restraining order pursuant to this section.

FILED
OCT 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-315

In The

Supreme Court of the United States

October Term, 1998

AMERICAN RE-INSURANCE COMPANY and NAC REINSURANCE CORPORATION,

Petitioners,

vs.

JOHN P. CRAWFORD, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, AS RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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51 pp

QUESTIONS PRESENTED

I. Does a state court, with exclusive jurisdiction over the liquidation of an insolvent insurance company in receivership, and with custody of receivership assets, have the authority to prohibit a federal action by reinsurers against the receiver to obtain those assets?

II. By operation of the McCarran-Ferguson Act, may state laws enacted for the purpose of regulating the business of insurance suspend federal remedies granted by conflicting federal statutes?

III. Does the McCarran-Ferguson Act empower a state court with jurisdiction over the liquidation of an insolvent insurance company to enjoin prosecution of a *quasi in rem* federal court action?

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF RESPONDENT

1. Parent company of Employers National Insurance Corporation in receivership: Employers Casualty Company, a Texas insurance company in receivership, Jack M. Webb, Special Deputy Receiver.

2. There are no nonwholly owned subsidiaries of Employers National Insurance Corporation.

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Respondent respectfully requests that the Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those listed by Petitioners, the following statutes are involved in this case: Okla. Stat. tit. 36, §§ 1918, 1927.1(A), 1927.1(B)(1), (B)(3) and (B)(6) (1991 and 1997 Supp.) These statutes are set forth in full in Respondent's Appendix, attached hereto. Further, the following statute was not set forth in full in Petitioners' Appendix, and is therefore set forth in full in Respondent's Appendix: 9 U.S.C § 4. References to Respondent's Appendix shall be in the form, "Resp. App. __a."

STATEMENT OF THE CASE

A. Proceedings In The District Court

Petitioners allege that they entered into reinsurance agreements with Employers National Insurance Corporation ("ENIC"). Respondent has, since the inception of this case, denied that it was a party to an agreement with Petitioners. Petitioners entered into reinsurance agreements only with ENIC's parent company, Employers Casualty Company ("ECC"). Respondent has always contended that its only reinsurance agreement was with its parent, ECC, a Texas insurer.

Before it was placed in receivership, ENIC paid $2,065,000, as a secondary insurer on an accident involving wrongful death claims. However, ECC, not ENIC, made claims for reinsurance against the Petitioners. Petitioners paid ECC under their reinsurance agreements. ENIC never received any reinsurance payment on the wrongful death claims, either from Petitioners or ECC. ECC has been placed in receivership in Texas.

After ENIC was placed in receivership in Oklahoma, ENIC filed a suit against the primary insurer, seeking damages for its improper handling of the claim, and recovered $1,500,000. The fund recovered is the asset of ENIC's estate. By law, the Respondent, as receiver of ENIC, is vested with title to all property of ENIC. Petitioners claimed ownership of the fund as "salvage," alleging that ENIC was a trustee for their benefit.

When Respondent declined Petitioners' claim for possession of the fund in question and refused Petitioners' written demand to submit the dispute to arbitration, Petitioners filed their Petition to Compel Arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, in the United States District Court for the Northern District of Texas. Pertinent excerpts of the Petition are included in Appendix C. Petitioners also requested a temporary restraining order and preliminary injunction, urging that Petitioners "have advised [Respondent] that these settlement funds are not part of the ENIC insolvency estate, but as a matter of law are deemed to be held in trust by the [Respondent] for [Petitioners] as subrogees." (Resp. App. 14a.) Because Respondent refused to relinquish control of the funds to them, Petitioners urged that an injunction was necessary to preserve the status quo. (Resp. App. 14a.) *Id.*

Respondent filed a Motion to Dismiss, contending that ENIC never entered into reinsurance agreements with Petitioners and that ENIC's only reinsurer was its parent. Respondent requested a hearing in accordance with 9 U.S.C. § 4. Immediately after Petitioners filed a reply, the district court denied the motion to dismiss, failed to set a hearing, and ordered the parties to arbitrate.

Respondent filed a Motion for New Trial, Rehearing, or to Alter or Amend Judgment, still denying that ENIC was a party to the reinsurance agreement. In addition, Respondent advised the district court that the state receivership court had enjoined any actions against the Respondent. The district court denied the motion

for new trial, but noted that "the state court is the court that should interpret and enforce its injunction." (Petitioners' Appendix 42a.)[1]

Based on this order, Respondent filed in the state receivership court a Motion for Temporary Restraining Order and Preliminary and Permanent Injunction and Citation for Contempt of Court. The court denied the request for a temporary restraining order, leaving the request for a permanent injunction and citation for contempt of court for another day.

Petitioners thereafter filed in the federal district court a Motion for Temporary Restraining Order and for a Preliminary and Permanent Injunction seeking to enforce the order compelling arbitration. The court denied Petitioners' motion and clarified its previous order. The court held that "[i]f the state court determines that the filing of this action violated its injunction, this Court will respect that decision by vacating the arbitration order and dismissing this case." Respondent was "directed to file a motion to dismiss with this Court" if the state court found that Petitioners violated the injunction. (Pet. App. 34a.)

The state court determined that the filing of the Petition to Compel Arbitration violated the injunction. In accordance with the federal court's directive, Respondent moved to dismiss the federal action. The federal district court, relying upon the full faith and credit clause and the *Burford* [2] abstention doctrine, vacated its order compelling arbitration and dismissed the case. (Pet. App. 29a-31a.)

B. The Fifth Circuit's Decision On Appeal

The court of appeals upheld the federal district court's dismissal of Petitioners' Petition to Compel Arbitration, but on

1. References to "Pet. App. __a" are to the Appendix attached to the Petition for Writ of Certiorari.

2. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

different grounds than that used by the federal district court. The court found that dismissal was not justified under *Burford*. Instead, it found that pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, provisions of the Oklahoma Uniform Insurers Liquidation Act ("OUILA"), Okla. Stat. tit. 36, §§ 1901-1938 (1991 and 1997 Supp.), reverse preempted the FAA. Because the provisions of OUILA preempted the FAA, the district court had no power to compel arbitration, and Respondents' Motion to Dismiss was properly granted.

In rendering its decision, the court of appeals faithfully followed this Court's decision in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993), with regard to what constitutes a law "enacted . . . for the purpose of regulating the business of insurance" under the McCarran-Ferguson Act. The court found two pertinent provisions of OUILA that were clearly enacted "for the purpose of regulating the business of insurance." (Pet. App. 17a-18a.)

First, Okla. Stat. tit. 36, § 1902(A) (1991) vests the Oklahoma County District Court with exclusive original jurisdiction over all delinquency proceedings. (Pet. App. 13a.) Second, Section 1904(B) of OUILA allows the state court to issue injunctions to enforce its exclusive jurisdiction by preventing interference with the receiver and prohibiting "the commencement or prosecution of any actions." (Pet. App. 14a.) These two provisions, the court of appeals held, were aimed at aiding policyholders. (Pet. App. 20a-21a.) Further, just as this Court did in *Fabe*, the court of appeals found that these provisions did not solely provide a benefit to all creditors, but were "reasonably necessary" to further the goal of protecting policyholders. (Pet. App. 20a.) The court reasoned that these statutes, by consolidating all claims against the insolvent insurer in one court, prevented the waste of funds that would occur if the receiver were forced to "defend unconnected suits in different forums across the country," eliminated "the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of

claimants," and conserved assets for ultimate payment to policyholders. Therefore, they were enacted for the purpose of regulating the business of insurance.

The court of appeals also found that the FAA would "invalidate, impair, or supersede" the relevant OUILA provisions. Ordering Petitioners' claims resolved in another forum directly conflicted with the exclusive forum provided by OUILA and with the power to enjoin any action interfering with the delinquency proceedings. (Pet. App. 25a.) An order compelling arbitration, the court held, would give the Petitioners exactly what OUILA and the state court injunction prohibited — an action heard outside the forum authorized by Oklahoma insurance statutes.[3] This impaired the statute under the McCarran-Ferguson Act. (Pet. App. 23a-24a.)

The Fifth Circuit noted that *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992), is a case "similar to the instant case." The court declined to follow *Bennett*'s reasoning that "[o]nly if a court or arbitrator determines that the funds belong to [the insolvent company] does that money become part of the estate that the liquidator will distribute" and only then does the receiver's authority vest. *Citing Bennett,* 968 F.2d at 972. This analysis contravened the law long ago established by this Court that if two *in rem* or *quasi in rem* proceedings exist, the court that first assumes jurisdiction over the property exercises its jurisdiction to the exclusion of the other. *Citing Penn. Gen. Cas. Company v. Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935). Petitioners here claim a vested property interest in specific proceeds held by the Respondent and ultimately seek a ruling as to ownership of the fund, making their action *in rem* or

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3. Petitioners assert that neither the statutes nor the injunction "expressly" bar arbitration. However, by barring "any action," both most certainly bar the filing of a petition to compel arbitration, and should be deemed to bar any action maintained outside of a court of law, such as arbitration.

quasi in rem. Further, the state court delinquency proceedings are *in rem* or *quasi in rem*. Consequently, the Oklahoma County District Court, as the court that first assumed jurisdiction over the fund, had sole power to determine ownership. *Citing United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477-79 (1936) (federal court has no jurisdiction to decide ownership of property involved in state court insurance company liquidation proceedings). (Pet. App. 22a-23a, n. 6.)

The court's opinion also addressed the question of whether a state court can enjoin a federal court proceeding. The Fifth Circuit held that although the law is well settled that state courts cannot generally enjoin *in personam* federal actions, no decision of this Court has yet construed the effect of the McCarran-Ferguson Act on that rule of law. Congress has the power to relax the prohibition against state court injunctions of federal actions. The court found that federal policy as set forth by Congress defers to state regulation of insolvent insurance companies. The court noted that this strong federal policy is reflected in the McCarran-Ferguson Act and the statutory exclusion of insurance companies from federal bankruptcy protection. These federal laws express the public interest in having the states and state courts as the "preeminent regulators of insurance." (Pet. App. 25a.)

Accordingly, the court held that "state laws regulating the business of insurance may suspend federal remedies based on conflicting federal statutes." In other words, because the FAA was reverse preempted by the McCarran-Ferguson Act, the federal district court was left without the power to compel arbitration. (Pet. App. 25a-26a.) Therefore, dismissal of the Petition to Compel Arbitration was proper.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CAN BE RECONCILED WITH DECISIONS IN OTHER CIRCUITS

Petitioners argue that the holding in *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992), creates a conflict between the Ninth and Fifth Circuits. However, the Ninth Circuit dissolved any conflict that may have existed when it decided *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372 (9th Cir. 1997) ("*Quackenbush II*").

The posture of *Bennett* differs substantially from the posture of this case and, as the Ninth Circuit noted in *Quackenbush II*, that difference is key. In *Bennett*, the liquidator filed the lawsuit under consideration in order to collect contractually owed payments. Here, by contrast, the Petitioners sued the receiver, asserting a claim against the assets held by the receiver.

When *Bennett* is read with the subsequent decision of the Ninth Circuit in *Quackenbush II*, it is clear there is no conflict between the Fifth and Ninth Circuits. In considering the effect of the McCarran-Ferguson Act on the California claims procedure, the Ninth Circuit court said:

> Under *Fabe*, there is no question that California's insurer-insolvency provisions regulate the "business of insurance" and are saved from preemption by the McCarran-Ferguson Act. Thus, Allstate [a creditor] could not invoke the FAA to compel arbitration of its claims *against* [the insolvent] Mission, which must be pursued through California's statutory insolvency scheme.

Quackenbush II, 121 F.3d at 1381 (emphasis added). Based on this language, it is clear that if the Ninth Circuit were considering the instant case today, its decision would be in accord with the Fifth Circuit's decision.

For the same reasons, the Third Circuit's decision in *Grode v. Mutual Fire, Marine & Inland Insurance Co.*, 8 F.3d 953 (3d Cir. 1993), does not present a conflict either. There, the posture of the case was the same as in *Bennett* and in *Quackenbush II*: the receiver was the plaintiff, seeking to recover a money judgment under a contract. The Third Circuit noted that "courts abstain in suits *against* insolvent companies . . . [because] a single forum [is] necessary to dispose equitably of the company's limited assets so as to avoid a race to the courthouse." *Grode*, 8 F.3d at 960. Because the suit in *Grode* was not one *against* the receiver, but one *by* the receiver, abstention was not appropriate. Thus, there is not a conflict between two circuits. Instead, there are two decisions that differ because they involve different facts.

The Fifth Circuit's decision is not in conflict with the Eighth Circuit's decision in *Murff v. Professional Medical Ins. Co.*, 97 F.3d 289, 292 (8th Cir. 1996). In Murff, an employee of an insurer was demoted, then terminated. Thereafter, the insurer was placed in rehabilitation. Murff filed an action in federal court under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq*. The insurer's rehabilitation was later converted to a liquidation and an injunction issued preventing anyone from obtaining a judgment against the insurer. On motion, the federal district court dismissed Murff's case, citing the McCarran-Ferguson Act.

On appeal, the Eighth Circuit examined the McCarran-Ferguson Act and found two of the Act's three-part test satisfied: the ADEA did not specifically relate to the business of insurance and the Missouri insolvency statutes were enacted for the purpose of regulating the business of insurance. *Murff*, 97 F.3d at 291. In

these two respects, the Eighth Circuit's opinion agrees with the Fifth Circuit's decision below.

In considering the last prong of the statutory test, whether the federal statute would "invalidate, impair, or supercede" the state insolvency statutes, the Eighth Circuit found that there was

> no inherent conflict between the ADEA and the [Missouri Insolvency Act]. The ADEA does not prohibit something that the Insolvency Act commands, nor does it command something that the Insolvency Act prohibits.

Allowing the ADEA claim to proceed in federal court, it ruled, would not impair the comprehensive liquidation scheme because the ADEA claimant *would still have only a low priority claim in the receivership court* after obtaining his judgment.

Although the Fifth Circuit found that the FAA was reverse preempted by the OUILA, its decision does not conflict with *Murff*. First, the Eighth Circuit in *Murff* did not address the question of whether the FAA was preempted by the Missouri Insolvency Act. The federal statute at issue there was the ADEA. As a result, even if a conflict existed, it is, at best, an indirect conflict.

Further, the FAA does indeed impair the Oklahoma insolvency statutes. In addition to providing for exclusive jurisdiction and injunction against other actions, OUILA provides in Section 1918 for a specific claims procedure for determining the validity of claims against the insolvent estate. The statute requires the Oklahoma County District Court to conduct the hearing regarding such claims. Arbitration is not an option. Thus, the FAA and the claims procedure of the Oklahoma insolvency act are completely at odds.

Morever, the plaintiff in *Murff* sought only a money judgment. As the Eighth Circuit noted, any judgment obtained gave the

plaintiff only a low priority claim that plaintiff would still be required to pursue in the liquidation proceedings. In the instant case, on the other hand, Petitioners seek recovery of specific proceeds held by the Receiver. This factual difference in the two cases also averts a conflict between the two decisions.

Last, even though the Eighth Circuit held that the federal district court should not have dismissed the ADEA lawsuit, it did not rule that the ADEA claimant could continue his case in the federal court. Instead, the court concluded that the lower court "should not have dismissed the action but should instead have considered whether the action should be stayed." *Murff*, 97 F.3d at 293. Here, the Fifth Circuit affirmed a dismissal. However, the Eighth Circuit's suggested stay of proceedings ends with the same result: the claimant must return to the receivership court.

Petitioners also urge that the Fifth Circuit's holding here is in conflict with the First Circuit's decisions in *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993) and *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). There is no conflict between these decisions and the decision on appeal here.

Fragoso was a medical malpractice case in which the insurance company was sued pursuant to Puerto Rico's direct action statute. The lower court granted summary judgment, holding the case was barred by the statute of limitations. After an appeal was lodged, the insurance company was placed in delinquency proceedings. The insurance commissioner moved to consolidate the case with the delinquency proceedings or to stay it in accordance with the insurance liquidation statutes. The court denied the commissioner's request, finding that it was not warranted either under the *Erie* doctrine[4] or under *Burford* abstention principles.

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4. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Petitioners rely on semantics to show the alleged conflict between *Fragoso* and the Fifth Circuit's decision. Parroting part of the McCarran-Ferguson Act (allowing preemption of a federal law that would "invalidate, *impair*, or supercede" the state law at issue), Petitioners assert that the First Circuit's holding that "allowing an action against an insolvent insurance company to proceed in federal court would not *impair* Puerto Rico's version of UILA," disagrees with the Fifth Circuit's decision here. (Petition for Writ of Certiorari, pp. 15-16.) However, the First Circuit was not referring to the impairment required by the McCarran-Ferguson Act. In fact, Petitioner's reliance on this case is inexplicable, because the case involved neither the McCarran-Ferguson Act nor the FAA.

The First Circuit did, however, address the application of the McCarran-Ferguson Act in connection with insurer insolvency statutes in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). There, again, the FAA was not involved. Instead, the First Circuit dealt with an issue that was an extension of this Court's decision in *Fabe*. A Puerto Rico insolvency statute provided that if claims were not filed in a timely manner, they received no priority. This provision conflicted with the federal law providing the I.R.S. with first priority in an insolvency case. Using the analysis this Court set forth in *Fabe*, the First Circuit found that the provision was neither directed toward nor necessary for the protection of policyholders.

Here, too, the Fifth Circuit followed the analysis in *Fabe*. Here, however, different state and federal statutes were involved and, therefore, the outcome was different. The fact that the outcomes differ does not create a conflict such as would require this Court to exercise jurisdiction and grant certiorari.

As the foregoing demonstrates, there is no conflict between the Fifth Circuit's decisions and the decisions of any of the other United States courts of appeal. This Court should, therefore, deny the Petition for Writ of Certiorari.

II.

THE FIFTH CIRCUIT FOLLOWED THIS COURT'S PRECEDENTS IN RENDERING ITS DECISION

In *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), this Court lent guidance on the question of what constitutes a law enacted "for the purpose of regulating the business of insurance" so as to trigger the reverse preemption granted by Congress in the McCarran-Ferguson Act. The Court considered the priority provisions of Ohio's insolvency laws and whether or not they prevailed over the federal statute giving the United States first priority in an insolvency. The Court held that the statute was enacted "for the purpose of regulating the business of insurance" to the extent it regulated policyholders. As this Court held:

> [t]he Ohio statute is enacted "for the purpose of regulating the business of insurance," to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims. That the policyholder has become a creditor and the insurer a debtor is not relevant.

Fabe, 508 U.S. at 506.

The Court ruled that the portion of the statute granting policyholders a higher priority than the I.R.S., was, therefore, enacted for the purpose of regulating the business of insurance.

In addition, this Court found that the priority given to administrative expenses also qualified as a law enacted for the purpose of regulating the business of insurance. The Court held that such a preference was "reasonably necessary to further the goal of protecting policyholders," because without payment of those costs, "liquidation could not even commence." *Fabe*, 508 U.S. at 509.

Following this Court's precedent as set forth in *Fabe*, the Fifth Circuit looked at individual provisions of OUILA.[5] The first provision, found at Okla. Stat. tit. 36, § 1902 (1991), vested exclusive jurisdiction over the insurer's delinquency proceedings in the Oklahoma County District Court. The second, § 1904(B), gives that court the power to enjoin interference with the delinquency proceedings, including the power to prohibit the commencement or prosecution of any actions and the obtaining of preferences and judgments.

These provisions gave the state court the power to decide all issues related to the assets of the insolvent insurance company, the Fifth Circuit noted. The effect of consolidating all proceedings in one court was the creation of a special relationship of cooperation and oversight between the court and the Insurance Commissioner. "This special relationship contributes markedly to the orderly liquidation or rehabilitation of the insurance company and the adjudication of claims against it" and ultimately to the payment of policyholder claims. (Pet. App. 18a.)

The policy of consolidating control in one court had as its end the protection of the relationship between the insurance company and its policyholders. The consolidation eliminated the unnecessary waste of assets that would occur if the receiver were forced to "defend unconnected suits in different forums across the country." It eliminated the risk of conflicting rulings, piecemeal litigation and *unequal treatment of claimants*.

Consolidation in an exclusive forum, the Fifth Circuit held, conserved the assets for ultimate payment to policyholders. (Pet.

5. Although the Fifth Circuit also opined that the whole of OUILA is a law enacted for the purpose of regulating the business of insurance, it did not rely on this analysis to reach its decision, noting that *Fabe* might require the parsing of a state statute to determine the extent to which it might preempt a federal statute under the McCarran-Ferguson Act.

App. 19a.) Although the provision also benefitted creditors of the estate, the Fifth Circuit noted that this did not affect the insurance-related character of the statute in *Fabe*. Statutes aimed at protecting the relationship between an insurer and its insured directly or indirectly were laws regulating the business of insurance. Consequently, the laws were "reasonably necessary to further the goal of protecting policyholders" as prescribed by *Fabe*, and were thus enacted for the purpose of regulating the business of insurance. (Pet. App. 20a.)

Petitioners make the misguided argument that an action in federal court does not fall within the definition of delinquency proceedings under OUILA. However, the jurisdictional provisions found in § 1902 have long been interpreted as meaning that any action against the receiver must be brought in that court. *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 706 (10th Cir. 1988); *Professional Construction Consultants, Inc. v. Grimes*, 552 F. Supp. 539 (W.D. Okla. 1982). The disposition of claims against the receiver are, of necessity, part of the delinquency proceedings. *See* Okla. Stat. tit. 36, § 1918 (1991) (providing exclusive procedure for creditors to file claims against the receivership).

Petitioners further argue that the jurisdiction of the Oklahoma County District Court is not exclusive because controverted claims by claimants in reciprocal states may be proved in ancillary proceedings in those states, citing Okla. Stat. tit. 36, § 1916 (1991). That statute actually says that claimants may file such a claim *if* there are ancillary proceedings. However, ancillary proceedings are brought only by the insurance commissioner in a state in which other assets may be found, not by a claimant. *See, e.g.*, Okla. Stat. tit. 36, § 1915(A) (1991).

The Fifth Circuit also followed this Court's decision in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982), when it concluded that the relevant provisions of OUILA regulated the business of insurance. In *Pireno*, the Court formulated a three-

part test. Something constitutes "the business of insurance" if it: (1) transfers and spreads the risk of insurer insolvency; (2) is an integral part of the policy relationship between the insured and the insurer; and (3) is limited to entities within the insurance industry. *Pireno*, 458 U.S. at 129.

As the Fifth Circuit noted,

> it is crucial to the relationship between the insurance company and its policyholders for both parties to know that, in the event of insolvency, the insurance company will be liquidated in an organized fashion.

(Pet. App. 16a.) OUILA's comprehensive regulatory scheme provides this assurance, and is, therefore, an integral part of the policy relationship between the insured and the insurer. Further, contrary to Petitioners' assertions, OUILA applies only to insolvent *insurance* companies, not to insolvent companies generally. Thus, OUILA is limited to entities within the insurance industry.

Although the Fifth Circuit did not examine the third factor, transfer of the policyholder's risk, it did not need to. *Fabe* supplies the needed analysis. There, this Court held that the performance of the terms of the insurance policy satisfies the transfer-of-risk element. *Fabe*, 508 U.S. at 503.

Similarly, in his dissenting opinion in *Pireno*, Justice Rehnquist looked to the legislative history of the McCarran-Ferguson Act and to *Royal Drug* and its predecessors, and noted that the relationship between the insurer and insured was the essence of the definition of "business of insurance" regardless of the inclusion of "risk-spreading" as an indispensable characteristic. In fact, he opined, "[T]he key representation of the insurance company and the principal expectation of the policyholder is that prompt payment will be made when the event insured actually occurs." *Pireno*, 458 U.S. at 136.

Here, OUILA, in liquidating the insolvent insurer, has as its aim the payment of the policyholder under the terms of the insurance contract. *See, e.g.*, Okla. Stat. tit. 36, § 1927.1(B) (1997 Supp.) (providing policyholder claims first priority behind administrative expenses). Performance under the terms of the insurance policy satisfies the other two parts of the *Pireno* test as well: it is central to the relationship between the insurer and the insured, and is confined to entities in the insurance industry. *Fabe*, 508 U.S. at 504. Clearly under both *Fabe* and *Pireno*, OUILA is a state law enacted for the purpose of regulating the business of insurance.

Petitioners next assert the irrelevant argument that

> [m]andating that all actions against an insurance company be brought in state court in the insurance company's domicile also is not an integral part of policy relationship between the insurer and the insured.

(Petition for Writ of Certiorari, pp. 20-21). None of the cases cited involve an insolvent insurance company. Further, two of the cases cited contain no discussion of forum selection, and the third does not support the proposition as applied here. The forum selection clause in a contract with an ongoing, solvent insurance company does nothing to assure the performance of the insurance contract, and may in fact hinder the policyholder who attempts to sue to enforce the contract. On the other hand, as discussed in detail below, the exclusive jurisdiction statute as applied to an insolvent insurance company may make the difference in whether the contract is ever performed as agreed and whether there is any money remaining after liquidation to make payment to the policyholder.

The Fifth Circuit, while it did not cite this Court's decision in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S.

205 (1979) in its opinion, nevertheless followed that precedent as well. In *Royal Drug*, an insurance company contended that its agreement with pharmacies to supply prescriptions at a specified cost was the "business of insurance" and exempt from the application of federal antitrust laws.[6] This Court disagreed. The agreements between the insurer and the pharmacies did not spread the policyholders' risks, but were mere cost-saving measures. While the cost saving might benefit policyholders in the form of lower premiums, the benefit was not the kind of direct benefit necessary to fall under the "business of insurance." The focus of the inquiry in defining the "business of insurance" was the relationship between the insurer and its policyholder, not the relationship between the insurer and medical providers.

Here, the jurisdictional and injunctive provisions are not mere cost-cutting measures. Even if their only purpose were to reduce expenses, the reduction of expenses in liquidating an insolvent insurance company affects the central core of the relationship between the insurance company and its policyholders — the insurance contract. Because the insurance company has a fixed asset base at the time of insolvency, each expense paid by the insolvent company reduces the fund from which policyholders will be paid. Thus, the reduction of administrative expenses in a liquidation may well make the difference between paying the policyholders in accordance with the terms of the contract and not paying them at all.

Further, the OUILA provisions are not just expense cutting measures. As the Fifth Circuit ruled in its opinion, the statutes prevent piecemeal litigation, conflicting rulings and unequal

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6. In *Fabe*, this Court notes that both *Royal Drug* and *Pireno* involve the scope of *antitrust immunity* afforded the business of insurance, a narrowly circumscribed exception to federal preemption of state law. As this Court held, the clause that excepts from preemption *state laws enacted for the purpose of regulating the business of insurance* is not so narrow. *Fabe*, 508 U.S. at 504.

treatment of claimants, all of which may deprive the policyholders of the benefits of their contracts. "Thus, consolidation, enforced through injunctions, conserves the insurance company's assets for ultimate payment to policyholders." (Pet. App. 19a.) It is this conservation of assets for payment to policyholders that makes the OUILA provisions statutes "enacted for the purpose of regulating the business of insurance" as defined by this Court.

Because the Fifth Circuit followed this Court's precedents, the Court should deny the writ of certiorari.

III.

THE FIFTH CIRCUIT DECIDED THIS CASE IN ACCORDANCE WITH FEDERAL POLICIES ARTICULATED IN THE McCARRAN-FERGUSON ACT

Petitioners suggest that the federal policy in favor of arbitration is so strong that this Court should simply ignore the application of the McCarran-Ferguson Act. However, if this Court follows its own directive that "the starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself," the Court should not do as Petitioners request. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). The McCarran-Ferguson Act provides, at 15 U.S.C. § 1012(b):

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance.

Of importance here is the inquiry generated by the last sentence: does the federal law at issue, here the FAA, "specifically

relate to the business of insurance?" The FAA does not. This ends the inquiry. No matter how important the policies behind the FAA, if it does not specifically relate to insurance, and the other tests set forth in the McCarran-Ferguson Act are met, the FAA must bow to the state statute.

Here, it is clear that the relevant provisions of OUILA do pass the other tests set forth in the McCarran-Ferguson Act. The FAA invalidates, impairs and supersedes the comprehensive statutory scheme set up by Oklahoma for the liquidation of insolvent insurers.

As discussed *infra*, § 1902 of OUILA gives the Oklahoma County District Court exclusive jurisdiction over any claims of an insolvent insurer involved in delinquency proceedings, and § 1904 allows the court to protect its exclusive jurisdiction by enjoining any other actions against the insurer.

In addition, OUILA § 1918 provides a mandatory method by which the Oklahoma County District Court determines the validity and amount of *all* claims against the insolvent insurer. The FAA, on the other hand, would enforce an arbitration agreement and put the decision concerning the validity and amount of the claim in the hands of arbitrators instead of the Oklahoma court. Thus, here, as in *Fabe*, there is a direct conflict between the Oklahoma statute and the FAA. The FAA, is, accordingly, a law that would "invalidate, impair or supersede" Oklahoma's procedure for determination of claims by the receivership court.

The FAA would also invalidate the priority scheme carefully articulated by the Oklahoma legislature in § 1927.1. That statute places the policyholders first after administrative expenses for payment from the assets of the estate. Reinsurers such as Petitioners are placed in the general creditor class, below the priority of policyholders and the federal government. Further, the statute prescribes that "[n]o claim . . . shall be permitted to circumvent

the priority classes through the use of equitable remedies," thus rejecting any "salvage" claim. Okla. Stat. tit. 36, § 1927.1(A)(1997 Supp.) If Petitioners are allowed to arbitrate pursuant to the FAA, the arbitrators may declare the settlement fund to be salvage and award Petitioners title to the fund, effectively moving Petitioners to the front of the priority line — before policyholders — in violation of the legislative liquidation scheme.

OUILA is also a state law enacted "for the purpose of regulating the business of insurance," because it furthers the interests of policyholders. Under insurer liquidation statutes, it is the Receiver's specific duty to gather the assets, determine the claims against the company and administer the affairs of the insurer *for the benefit of the policyholders*. *Garris v. Carpenter*, 92 P.2d 688, 33 Cal. App. 2d 649 (1939); *Pensinger v. Pacific States Life Ins. Co.*, 25 F. Supp. 295 (D. Mo. 1938). It is in this manner that the Oklahoma statute protects policyholders and assures they will receive payment. Thus, the provisions of OUILA, the exclusive jurisdiction of § 1902, the injunction to prevent interference with the state court contained in § 1904, and the claims procedure found in § 1918, all prevail over the FAA.

Petitioners cite many cases that undeniably state that the federal interest in enforcing arbitration agreements is very strong.[7] However, regardless of how important Congress thought it was to enforce arbitration, it did not deem it important enough to make the FAA specifically relate to the business of insurance, so as to

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7. Among the cases cited by Petitioners is this Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996) (*Quackenbush I*). As noted in the discussion regarding *Quackenbush II*, however, the posture of that case differs from the instant case, in that the receiver was the plaintiff there, where he is the defendant here. Further, as noted by Petitioners, this Court did not address the impact of the McCarran-Ferguson Act on the FAA in *Quackenbush I*. This fact also makes *Quackenbush I* a much different case than the one before this Court today.

avoid the reverse preemption of the McCarran-Ferguson Act. It would have been a simple matter to do so. Congress did not. This Court should not now write into the FAA a provision that Congress chose not to include.

IV.

THE FIFTH CIRCUIT'S DECISION REGARDING THE STATE COURT'S POWER TO ISSUE ITS INJUNCTION IS IN ACCORD WITH THE DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

The Fifth Circuit's pronouncement regarding a state court's power to enjoin an *in personam* action are in perfect accord with other circuit's decisions. This is what, precisely, the Fifth Circuit said:

> We surely are not saying that a State has the power to enjoin a party generally from pursuing federal remedies in federal court. Nor are we saying that Oklahoma law divested the district court of its diversity jurisdiction. *See Martin*, 910 F.2d at 254 (rejecting the argument that McCarran-Ferguson Act removes diversity jurisdiction from federal courts in insurance matters). What we are saying is that, by operation of the McCarran-Ferguson Act, a federal act that permits states to exert broad power over the insurance industry, state laws regulating the business of insurance may suspend federal remedies based on conflicting federal statutes – here, the FAA.

(Pet. App. 25a-26a.)

The Fifth Circuit's statement in no way conflicts with *Murff's* holding that a "state court cannot . . . enjoin federal court actions."

Further, when the Eighth Circuit held that the ADEA did not impair the Missouri insolvency statutes in *Murff*, it found that the McCarran-Ferguson Act did not even apply. Thus, the Eighth Circuit has not addressed whether the McCarran-Ferguson Act may properly suspend federal remedies when they conflict with state laws enacted for the purpose of regulating the business of insurance.

The same is true with the First Circuit decision in *Fragoso*, which ruled that "a state court cannot enjoin federal proceedings." There, the court never considered the McCarran-Ferguson Act. Because it did not, its decision does not pose a conflict with the Fifth Circuit's decision below.

The Fifth Circuit's holding is in accord with this Court's decisions as well. In fact, the very cases Petitioners hold up as contradicting the Fifth Circuit's decision were cited by the Fifth Circuit and reconciled with its holding: *Donovan v. Dallas*, 377 U.S. 408 (1964), *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and *General Atomic Co. v. Felter*, 434 U.S. 12 (1977).

As the Fifth Circuit noted, none of these cases addressed the question of what affect the application of the McCarran-Ferguson Act has on the state court's power to enjoin the pursuit of federal remedies in an *in rem* or *quasi in rem* action. Both *Moses H. Cone* and *General Atomic* were *in personam* actions. The McCarran-Ferguson Act was not at issue in either case.

Donovan was also an *in personam* action which did not involve the McCarran-Ferguson Act. Nevertheless, the language of *Donovan* supports the Fifth Circuit's decision. As this Court noted in *Donovan*, state and federal courts may not interfere with or try to restrain each other's *in personam* proceedings. However, when the action is *in rem*, the rules change. When the action is *in rem*, the court first taking jurisdiction over the *res* exercises exclusive jurisdiction.

This Court discussed the difference between the treatment of *in personam* and *in rem* or *quasi in rem* cases in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477-79 (1936), a case cited by the Fifth Circuit. (Pet. App. 23a, n. 6.)

In *Bank of New York*, the United States filed suit against a liquidator, claiming by assignment all assets of the insolvent insurer. The suit was dismissed. On appeal, this Court reiterated the rule that the first court assuming jurisdiction over a *res* shall maintain jurisdiction to the exclusion of all other courts. The Court held that this rule is not limited to cases where the property is actually seized, but applies also to cases such as a delinquency proceeding, where the suit is one to marshall assets and administer an estate. The Court also noted that the suit by the United States was not an *in personam* suit as the United States argued, but one to obtain possession of a particular fund. As the Court noted, the United States demanded that the holder of the funds account for and pay to the U.S. the entire fund in its hands.

> Thus the object of the suits is to take the property from the depositories and from the control of the state court, and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings.

Bank of New York, 296 U.S. at 478.

Here, ENIC was declared insolvent and Respondent was appointed its receiver. Respondent was called to marshall the assets of the insolvent insurer and to administer the estate. The settlement funds in question are under the control of the state court. As a result, the state proceeding is *quasi in rem*. Further, although Petitioners characterize their Petition to Compel Arbitration as an *in personam* action only, their pleading urges the funds "as a matter of law are deemed to be held in trust" by Respondent for the Petitioners. (Resp. App. 14a.) Petitioners clearly sought to take

the fund in question from the Respondent and from the control of the state court and vest it in Petitioners to the exclusion of the claimants, including the policyholders, of the Respondent. Under this Court's decisions in *Donovan* and *Bank of New York*, Petitioners may not do so.

V.

THE FIFTH CIRCUIT COULD ALSO HAVE UPHELD THE DISTRICT COURT'S DECISION UNDER THIS COURT'S DECISION IN *BURFORD*

Although a federal court has a duty to exercise the jurisdiction conferred upon it by Congress, that duty is not absolute. A court may decline to exercise its jurisdiction in cases where denying a federal forum will serve an important countervailing interest. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

Burford and its progeny instruct that one such countervailing interest arises when the exercise of federal jurisdiction "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Quackenbush I*, 517 U.S. at 726-27. *Burford* requires abstention where the exercise of federal court jurisdiction would interfere with a specialized, unified state court system of adjudication designed to avoid inconsistent adjudication of claims arising from a comprehensive, detailed, and complex regulatory scheme in a subject area involving state law. *Quackenbush I*, 517 U.S. at 716.

Here, pursuant to OUILA, the Oklahoma state court enjoined any action against the Respondent. As discussed above, OUILA provides a comprehensive and specific procedure requiring that all claims against the insolvent insurer be prosecuted in the receivership court. The procedure serves public policy by assuring the orderly liquidation of the insolvent insurer, and aids in the protection of policyholders by achieving the maximum payment

on their claims. *Burford* abstention is proper here to prevent the circumvention of the claims procedure and exclusive jurisdiction that would arise if a federal court exercises jurisdiction over claims against an insolvent insurer. Abstention prevents interference with the *in rem* jurisdiction of the receivership court and with the specialized and unified regulatory system set up by the Oklahoma Legislature to liquidate insolvent insurers.

The Fifth Circuit ruled that *Burford* abstention would not be proper under this Court's decision in *Quackenbush I*. The court held that, because the relief sought by Petitioners was neither equitable nor committed to the discretion of the district court, it simply could not abstain in this case.

The court of appeals failed to recognize that the nature of Petitioners' claim is purely equitable. As this Court did in *Quackenbush I*, the Fifth Circuit should have looked at the nature of the underlying claim to determine whether it was equitable or legal. Although Petitioners urge that they only claim damages, their Petition to Compel Arbitration clearly shows otherwise. Petitioners state that the settlement funds constitute "salvage" and urge that the law deems the funds to be held in trust by Respondent for the benefit of Petitioners. (Resp. App. 13a. and 14a.) Their claim for salvage is an equitable claim. Thus, the district court's dismissal under *Burford* was appropriate.

The Fifth Circuit also misreads this Court's decision in *Quackenbush I*. Justice O'Connor, writing for the Court, stated that the Supreme Court has "permitted federal courts applying abstention principles in damages actions to enter a stay," where an outright dismissal would be impermissible, and noted that a stay in the district court might have been in order. *Quackenbush I*, 517 U.S. at 730-31. Because it only reviewed the remand order entered by the Ninth Circuit, however, the Court found it "unnecessary to determine whether a more limited abstention-based stay" was appropriate. *Quackenbush* I, 517 U.S. at 731. Here, a stay would have been proper.

Burford abstention is further justified because application of the priority scheme in § 1927.1 of OUILA to equitable reinsurance claims, such as salvage, is a matter of substantial state concern. That statute, put in place in part as a response to this Court's decision in *Fabe*, is completely untested. For these reasons, the district court in this action could have entered a stay of proceedings in accordance with this Court's rulings in *Burford* and *Quackenbush I*.

CONCLUSION

The Fifth Circuit's decision is in accord with this Court's precedents and does not conflict with decisions of other United States courts of appeal. The Court should, therefore, deny the Petition for Writ of Certiorari.

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APPENDIX

APPENDIX A — FEDERAL ARBITRATION ACT, 9 U.S.C. SECTIONS 1-16

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the

manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

APPENDIX B — OKLAHOMA UNIFORM INSURERS LIQUIDATION ACT ("OUILA"), OKLA. STAT. TIT. 36, §§ 1901-1938

§ 1918. Proof of claims; notice; hearing

A. All claims against an insurer against which delinquency proceedings have been begun shall set forth in reasonable detail the amount of the claim, or the basis upon which such amount can be ascertained, the facts upon which the claim is based, and the priorities asserted, if any. All such claims shall be verified by the affidavit of the claimant, or someone authorized to act on his behalf and having knowledge of the facts, and shall be supported by such documents as may be material thereto.

B. All claims filed in this state shall be filed with the receiver, whether domiciliary or ancillary, in this state, on or before the last date for filing as specified in this article.

C. Within ten (10) days of the receipt of any claim, or within such further period as the court may, for good cause shown, fix, the receiver shall report the claim to the court, specifying in such report his recommendation with respect to the action to be taken thereon. Upon receipt of such report, the court shall fix a time for hearing the claim and shall direct that the claimant or the receiver, as the court shall specify, shall give such notice as the court shall determine to such persons as shall appear to the court to be interested therein. All such notices shall specify the time and place of the hearing and shall concisely state the amount and nature of the claim, the priorities asserted, if any, and the recommendation of the receiver with reference thereto.

D. At the hearing, all persons interested shall be entitled to appear and the court shall enter an order allowing, allowing in part, or disallowing the claim. Any such order shall be deemed to be an appealable order.

Appendix B

§ 1927.1 Priority of distribution of claims from insurer's estate

A. The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Before the members of the next class receive any payment, every claim in each class shall be:

1. Paid in full; or

2. Protected by adequate funds retained for such payment.

Once such funds are approved by the court and paid or retained by the liquidator, the insurer's estate shall have no further liability to members of that class except to the extent of the retained funds and any other undistributed funds. Payment of retained funds pursuant to court order under this section extinguishes the potential liability of the receiver to the United States or any other governmental entity. No subclasses shall be established within any class except as otherwise provided by law. No claim by a shareholder, policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies. The order of distribution of claims shall be as provided in subsection B of this section.

B. 1. Class 1. The reasonable costs and expenses of administration expressly approved by the receiver, including but not limited to the following:

a. the actual and necessary costs of preserving or recovering the assets of the insurer,

b. compensation for all authorized services rendered in the conservation, rehabilitation or liquidation,

c. any necessary filing or recordation fees,

d. the fees and mileage payable to witnesses, including experts, and other litigation costs and expenses,

e. authorized reasonable attorney's fees and other professional services rendered in the conservation, rehabilitation or liquidation, and

f. any reasonable expenses that were incurred in furtherance of activities that provided a material economic benefit to the estate.

2. Class 2. The administrative expenses of guaranty associations. For purposes of this section these expenses shall be the reasonable expenses incurred by guaranty associations where the expenses are not payments or expenses which are required to be incurred as direct policy benefits in fulfillment of the terms of the insurance contract or policy, and that are of the type and nature that, but for the activities of the guaranty association otherwise would have been incurred by the receiver, including but not limited to evaluations of policy coverage, activities involved in the adjustment and settlement of claims under policies, including those of in-house or outside adjusters, and the reasonable expenses incurred in connection with the arrangements for ongoing coverage through transfer to other insurers, policy exchanges or maintaining policies in force. The receiver may in his or her sole discretion approve as an administrative expense under this section any other reasonable expenses of the guaranty association if the receiver finds:

a. the expenses are not expenses required to be paid or incurred as direct policy benefits by the terms of the policy, and

b. the expenses were incurred in furtherance of activities that provided a material economic benefit to the estate as a whole, irrespective of whether the activities resulted in additional benefits to covered claimants.

The court shall approve such expenses unless it finds the receiver abused his or her discretion in approving the expenses. If the receiver determines that any administrative expenses of a guaranty association were not reasonable expenses, but were nevertheless paid out of a statutory deposit or the proceeds of any bond or other asset located in another state or foreign country, then the court shall adjudge the Class 3 claims of that association to have been paid to the extent of the amount of unreasonable expenses thus paid from those assets.

If the receiver determines that the assets of the estate will be sufficient to pay all Class 1 claims in full, Class 2 claims shall be paid, provided that the liquidator shall secure from each of the associations receiving disbursements pursuant to this section an agreement to return to the liquidator such disbursements, together with investment income actually earned on such disbursements, as may be required to pay Class 1 claims. No bond shall be required of any such association.

3. Class 3. All claims under policies including claims of the federal or any state or local government for losses incurred ("loss claims") including third party claims, claims for unearned premiums, all claims of a guaranty association for payment of

covered claims or covered obligations of the insurer and all claims of a guaranty association for reasonable expenses other than those included in Class 2. All claims under life and health insurance and annuity policies, whether for death proceeds, health benefits, annuity proceeds, or investment values shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligation of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment by an employer to his employee shall be treated as a gratuity.

Notwithstanding the foregoing, the following claims shall be excluded from Class 3 priority:

a. obligations of the insolvent insurer arising out of reinsurance contracts,

b. obligations incurred after the expiration date of the insurance policy or after the policy has been replaced by the insured or canceled at the insured's request or after the policy has been canceled as provided in this act. Notwithstanding the provisions of this paragraph, earned premium claims on policies, other than reinsurance agreements, shall not be excluded,

c. obligations to insurers, insurance pools or underwriting associations and their claims for contribution, indemnity or subrogation, equitable or otherwise,

d. any claim which is in excess of any applicable limits provided in the insurance policy issued by the insolvent insurer,

e. any amount accrued as punitive or exemplary damages unless expressly covered under the terms of the policy, and

f. tort claims of any kind against the insurer, and claims against the insurer for bad faith or wrongful settlement practices.

4. Class 4. Claims of the federal government other than those claims included in Class 3.

5. Class 5. Debts due employees for services, benefits, contractual or otherwise due arising out of such reasonable compensation to employees for services performed to the extent that they do not exceed two (2) months of monetary compensation and represent payment for services performed within six (6) months before the filing of the petition for liquidation or, if rehabilitation preceded liquidation, within one (1) year before the filing of the petition for rehabilitation. Principal officers and directors shall not be entitled to the benefit of this priority except as otherwise approved by the liquidator and the court. This priority shall be in lieu of any other similar priority which may be authorized by law as to wages or compensation of employees.

6. Class 6. Claims of any person, including claims of state or local governments, except those specifically classified elsewhere in this section.

Appendix B

7. Class 7. Claims for commissions and service fees, and claims of attorneys for fees and expenses owed them by a person for services rendered in opposing a formal delinquency proceeding. In order to prove the claim, the claimant must show that the insurer which is the subject of the delinquency proceeding incurred such fees and expenses based on its best knowledge, information and belief, formed after reasonable inquiry indicating opposition was in the best interests of the person, was well grounded in fact and was warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that opposition was not pursued for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

8. Class 8. Claims of any state or local government for a penalty or forfeiture, but only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under paragraph 9 of this section.

9. Class 9. Surplus or contribution notes or similar obligations, premium refunds on assessable policies, interest on claims of Classes 1 through 8 and any other claims specifically subordinated to this class.

10. Class 10. Claims of shareholders or other owners arising out of their capacity as shareholders or other owners, or arising in any other capacity or facts except as they may be qualified in Class 3 or 4 above.

APPENDIX C — PETITION TO COMPEL ARBITRATION UNDER THE FEDERAL ARBITRATION ACT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION PENDING ARBITRATION, FILED JULY 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

No. 3:96-CV-2024-T

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE COMPANY, AND NAC REINSURANCE CORPORATION,

Petitioners,

v.

JOHN R. CRAWFORD, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, AS RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION,

Respondent.

PETITION TO COMPEL ARBITRATION UNDER THE FEDERAL ARBITRATION ACT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION PENDING ARBITRATION

COMES NOW, MUNICH AMERICAN REINSURANCE COMPANY ("Munich American") and NAC REINSURANCE

Appendix C

CORPORATION ("NAC Re"), formerly known as North American Company for Property and Casualty Insurance, Petitioners in the above-styled and numbered cause, seeking (1) an Order under section four of the Federal Arbitration Act, 9 U.S.C. § 4, compelling arbitration of their disputes with the Respondent, JOHN R. CRAWFORD, INSURANCE COMMISSIONER OF OKLAHOMA, AS THE RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION and (2) a temporary restraining order and preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure to maintain the status quo pending arbitration and award:

* * *

6. Pursuant to Umbrella Liability Reinsurance Agreement CAF 4139 ("MARC Agreement") between Munich American and Employers Casualty Company (including subsidiaries) (collectively the "Company"), effective January 1, 1986, Munich American agreed to pay to the Company a certain percentage share of the amount of net loss allocable under each Umbrella policy covered by the MARC Agreement. (A copy of the MARC Agreement is annexed as Exhibit A).

7. Pursuant to an Umbrella Liability Reinsurance Agreement ("NAC Re Agreement") between North American Company for Property and Casualty Insurance, now NAC Re, and Employers Casualty Company (including subsidiaries) (collectively the "Company"), effective January 1, 1986, NAC Re agreed to pay to the Company a certain percentage share of the amount of net loss allocable under each Umbrella policy covered by the NAC Re Agreement. (A copy of the NAC Re Agreement is annexed as Exhibit B).

Appendix C

8. Under the MARC Agreement and the NAC Re Agreement (collectively, the "reinsurance agreements") "net loss" means, "all payments by the Company in settlement of claims or losses . . . after deduction of salvage . . . ." (*See* Exs. A and B at Article IV(A)). "Salvage" is defined in the respective reinsurance agreements as follows:

> *Salvage* - This term shall mean any recovery made by the Company in connection with a claim or loss, less all expenses paid by the Company, other than payments to any salaried employee of the Company making such recovery.

(Exs. A and B at Article IV(C)). The agreements also provide for subsequent adjustments in net loss and payment of any amounts due either party:

> Upon receipt of a definite statement of net loss from the Company, the Reinsurer shall promptly pay to the Company the Reinsurer's portion of net loss and the Reinsurer's portion of adjustment expense, if any. Any subsequent changes in the amount of net loss shall be reported by the Company to the Reinsurer and the amount due either party shall be remitted promptly.

(Exs. A and B at Article XII(A)).

* * *

10. In 1991, Jobs Building Services, Inc. ("JOBS") settled a wrongful death claim requiring ENIC to pay $2,065,000 under an umbrella policy. Pursuant to their respective reinsurance

agreements, Munich American paid $829,250, plus expenses, and NAC Re paid $829,250, plus expenses, as their respective shares of ENIC's net loss.

* * *

12. In June 1995, the net settlement funds, in the amount of $1,500,000, were tendered to and accepted by the Receiver on behalf of ENIC. (A copy of an October 4, 1995 letter to NAC Re acknowledging receipt by ENIC in Receivership is annexed as Exhibit C).

13. Munich American and NAC Re claim subrogation rights to these settlement funds because they constitute "salvage" recovered in connection with the JOBS claim for which Munich American and NAC Re have paid their respective shares under the reinsurance agreements.

14. Disputes have arisen between the Receiver and Munich American and NAC Re concerning Munich American's and NAC Re's claims to their shares of these settlement funds.

15. The Receiver refuses to tender to Munich American and NAC Re their respective shares of these settlement funds.

16. Each of the reinsurance agreements contains an agreement to arbitrate disputes. Article XV, entitled "Arbitration," which is identical in both reinsurance agreements, provides in part:

> As a condition precedent (sic) to any right of action hereunder, any dispute arising out of this Agreement, as well as any differences concerning

> the validity of this Agreement, shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire meeting in Dallas, unless otherwise agreed. The laws of the State of Texas shall govern the interpretation of this Agreement.

(*See* Exs. A and B at Article XV(A)).

* * *

21. Upon information and belief, the Receiver has retained the settlement funds and has not as yet used or disposed of them in any manner. Munich and NAC Re have advised the Receiver that these settlement funds are not part of the ENIC insolvency estate, but as a matter of law are deemed to be held in trust by the Receiver for Munich and NAC Re as subrogees. However, the Receiver refuses to relinquish control of the settlement funds to Munich American and NAC Re.

* * *

WHEREFORE, PREMISES CONSIDERED, Petitioners Munich American Reinsurance Company and NAC Reinsurance Corporation respectfully pray that the Court issue an Order compelling the Receiver to proceed with arbitration and a preliminarily (sic) injunction to preserve the status quo pending arbitration prohibiting the Receiver from using, encumbering, or otherwise disposing of the settlement funds of $1,500,000, and the interest earned thereon, pending the arbitration and award, and such other relief as the Court deems appropriate.

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OCT 20 1998
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No. 98-315

In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN RE-INSURANCE COMPANY
AND NAC REINSURANCE CORPORATION,

PETITIONERS,

V.

JOHN P. CRAWFORD, INSURANCE COMMISSIONER
OF THE STATE OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE REINSURANCE ASSOCIATION OF AMERICA AND THE BROKERS AND REINSURANCE MARKETS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

This brief is filed on behalf of the Reinsurance Association of America ("RAA") and the Brokers and Reinsurance Markets Association ("BRMA"). The RAA is the principal voice of the American reinsurance industry. Its 29 member companies are reinsurers principally engaged in the business of assuming property and casualty reinsurance. Approximately half are owned by foreign parent companies. Together, RAA members write over 75% of the reinsurance written by American professional property and casualty reinsurers on domestic risks. The BRMA represents reinsurance brokers, professional reinsurers, and reinsurance departments of insurance companies, all of whom obtain business through reinsurance brokers.

Amici's members have a vital interest in the enforcement of their arbitration agreements. Because arbitration avoids the costliness and delays of litigation and permits the parties to take advantage of specialists familiar with insurance industry custom and usage, reinsurance contracts almost universally specify that all disputes between the reinsurer and insurer must be resolved through arbitration. In fact, the reinsurance industry has utilized the arbitration process since at least the early 1800's, when arbitration clauses were commonly used in English marine reinsurance contracts. RAA, *Manual for the Resolution of Reinsurance Disputes* 8 (1997). The arbitrability of disputes is particularly important in this industry because of its international scope. Reinsurers outside the United States account for approximately 42% of all reinsurance in the

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

United States. RAA, *Alien Reinsurance in the U.S. Market:* 1996 Data 13 (1998). Of the 100 largest reinsurers in the world, only 27 are American. Reactions, *Standard & Poors Top 100 Insurers*, 29-46 (March 1998). Where contracts commonly cross numerous national boundaries, arbitration avoids the expense and costliness of protracted international litigation.

Strict enforcement by the federal courts of agreements to arbitrate are especially important where, as here, the insurer has been declared insolvent and entered liquidation.[2] *Amici* accordingly have sought to advance their members' interests by filing briefs in several cases involving challenges to the enforcement of arbitration clauses against liquidators hostile to federal arbitration rights. For example, they filed an *amici* brief in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), in which this Court rejected the notion that the *Burford* abstention doctrine permits federal courts to abstain from enforcing arbitration agreements against liquidators of insolvent insurance companies.

In this case, Respondent achieved the very result—a refusal by the federal court to compel arbitration—that the liquidator failed to achieve in *Quackenbush*, this time under the aegis of the McCarron-Ferguson Act, 59 Stat. 33, 15 U.S.C. §1011 *et seq.* The Fifth Circuit held that provisions of the Oklahoma Uniform Insurers Liquidation Act ("OUILA") which vest exclusive original jurisdiction over insurer delinquency proceedings in a state court and authorize that state court to enjoin other actions against the insolvent insurer reverse preempt a reinsurer's right under the Federal Arbitration Act, 61 Stat. 669, 9 U.S.C. §§ 1-16, 201-08 (the "FAA") to enforce its arbitration agreement with the insolvent insurer. In addition, the Fifth Circuit held that the

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[2] Between 1969 and 1990, 372 property/casualty insurers in the United States became insolvent. A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers, 1969-1990* 1-2 (June 1991).

McCarron-Ferguson Act empowers the state court to enjoin a reinsurer from even bringing an action to compel arbitration in federal court. Because the vast majority of states have adopted versions of the Uniform Insurers Liquidation Act ("UILA") or the Insurance Rehabilitation and Liquidation Model Act ("IRLMA") which include provisions similar to those at issue here,[3] the Fifth Circuit's decision threatens reinsurers' continuing ability to rely on the strict enforcement of their arbitration agreements.

The Fifth Circuit's decision is plainly wrong, and it exacerbates confusion in the lower courts about matters that are of vital importance to the reinsurance industry. If the decision stands, it will have adverse and far-reaching effects on domestic and international reinsurers. We believe this Court's review is urgently needed, and accordingly submit this brief in support of Petitioners.

SUMMARY OF ARGUMENT

In *Quackenbush*, this Court rejected the argument that a federal district court may not compel arbitration of a reinsurer's dispute with an insolvent insurer that is in liquidation. In that case, the petitioner argued that the policies underlying the McCarron-Ferguson Act favored abstention. Having lost that argument, liquidators nationwide retooled. They now argue that, as a matter of substantive law—not just policy—the McCarron-Ferguson Act prohibits the federal courts from enforcing arbitration agreements between reinsurers and insolvent insurers whenever state law designates a state court as the exclusive forum for delinquency proceedings. This argument profoundly misapprehends the scope of the McCarron-Ferguson Act. By adopting it in this case, the Fifth Circuit rendered *Quackenbush* a nullity and exacerbated confusion

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[3] III National Association of Insurance Commissioners ("NAIC"), *Model Laws, Regulations & Guidelines*, §§555-1, 555-63-67 (1998).

in the lower courts on a matter of critical significance to the U.S. reinsurance industry.

I. Contrary to the Fifth Circuit's decision in this case, a jurisdictional statute that establishes an exclusive state forum for insurer delinquency proceedings is not a law enacted for the purpose of regulating the business of insurance within the meaning of the McCarron-Ferguson Act. In *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501-06 (1993), the Court explained that a law will be viewed as one enacted to regulate the business of insurance only if (i) it regulates the insurer-policyholder relationship or if (ii) it is necessary for the protection of policyholders. The provisions at issue in this case satisfy neither criteria. The centralization of all claims involving an insolvent insurer in a single state court affects the forum in which claims are adjudicated, not the parties' substantive rights. Moreover, the asserted benefits of this centralization—speedy and efficient administration of the liquidation—provide (at most) an indirect, tangential benefit to policyholders. Centralization of all litigation involving the insolvent insurer in state court is by no means *necessary* for the protection of policyholders. The Fifth Circuit's analysis of this issue conflicts squarely with that of the First Circuit in *Garcia v. Island Program Designer*, 4 F.3d 57 (1st Cir. 1993) (Breyer, J.).

The Fifth Circuit also erred when it held that arbitration of disputes between reinsurers and insolvent insurers would impair the operation of Oklahoma's liquidation process. To begin with, it is impossible to square this holding with the court of appeals' concession that the Oklahoma liquidating court itself might well compel arbitration of the dispute in question as a matter of state law. Further, the holding conflicts directly with this Court's repeated admonition that the adjudication of *in personam* claims by a forum other than the state court does not impair the administration of the liquidation or the payment of claims. Numerous courts of appeals have concluded that neither arbitration of

disputes between the liquidator and reinsurers nor litigation of federal claims against the liquidator in federal court impairs a state's centralized liquidation scheme. The Fifth Circuit concluded otherwise only by ignoring this Court's teachings. The Fifth Circuit acknowledged that this aspect of its decision conflicts with the decision of the Ninth Circuit in *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 972 (9th Cir. 1992), which it described as "a case very similar to the instant case." Pet. App. 22a n.6.

II. Although the Fifth Circuit professed that it was not holding that the state court has authority to enjoin Petitioners from seeking to enforce their federal rights under the FAA in federal court, its opinion cannot be read otherwise. In light of the court of appeals' acknowledgment that the state court might well compel arbitration in this case, its refusal to afford the same relief endorsed the state court's injunction against federal jurisdiction. The Fifth Circuit's decision cannot be reconciled with this Court's numerous holdings that state courts cannot enjoin parties from prosecuting *in personam* actions in federal court. Its suggestion that the McCarron-Ferguson Act empowers state courts to enjoin federal jurisdiction conflicts with the holding of the Eighth Circuit in *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 2452 (1997).

III. Because state insurer liquidation laws almost uniformly vest jurisdiction over delinquency proceedings in state courts, the decision of the Fifth Circuit poses a severe threat to reinsurers' ability to enforce their arbitration agreements under the FAA once insurers have become insolvent. This is a matter of critical importance, because in the reinsurance industry, which is international in scope, almost all contracts contain arbitration agreements, and reinsurers rely on arbitration for the prompt, efficient resolution of disputes.

The Fifth Circuit's suggestion that the need for efficient resolution of state delinquency proceedings precludes the

enforcement of arbitration agreements is directly contrary to congressional policy. The FAA was enacted to eliminate such judicial hostility to arbitration. This Court has not hesitated to intervene when the decisions of lower courts have threatened the substantial federal interest in the enforcement of arbitration contracts. Similar intervention is necessary in this case.

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING THAT THE FAA IS REVERSE PREEMPTED BY OKLAHOMA'S INSURER INSOLVENCY LAW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with rules applicable to other contracts, 9 U.S.C. § 2, and grants federal courts the power to enforce arbitration agreements by compelling arbitration, staying proceedings pending arbitration, and affirming arbitral awards, 9 U.S.C. § 3, 4, 9. In this case, the district court found that it had subject matter jurisdiction over Petitioners' suit and that Petitioners have the right to compel arbitration under the terms of their agreement with Respondent. The Fifth Circuit did not question either finding. Moreover, the Fifth Circuit identified no Oklahoma law that would preclude arbitration in these circumstances. Indeed, it conceded that the state court overseeing Respondent's liquidation might well compel arbitration under state law. Nonetheless, the court of appeals concluded that Petitioners' right to compel arbitration under the FAA was reverse preempted by Oklahoma law; in particular, by provisions of OUILA that vest exclusive original jurisdiction over delinquency proceedings in state court and authorize that court to enjoin other actions against the insolvent insurer. *See* Okla. Stat. Tit. 36 §§1901-03.

Section 2(b) of the McCarron-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The Fifth Circuit held (i) that the jurisdictional and injunction provisions of OUILA are "laws enacted ... for the purpose of regulating the business of insurance," and (ii) that enforcement of petitioners' arbitration rights under the FAA would "invalidate, impair, or supersede" these state laws. In both respects, the decision of the Fifth Circuit conflicts with the decisions of other courts of appeals[4] and with this Court's controlling precedents.

A. OUILA's Exclusive Jurisdiction and Injunction Provisions Are Not Laws Enacted for the Purpose of Regulating the Business of Insurance

This Court addressed the application of the McCarron-Ferguson Act to state insurer insolvency laws in *Fabe*. That case involved a conflict between a federal statute that provided the United States first priority with respect to a bankrupt debtor's obligations, 31 U.S.C. § 3713, and provisions of Ohio's insurance insolvency law that afforded

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[4] *See Garcia*, 4 F.3d at 61 (insolvency law that benefits policyholders only indirectly is not a "law[] enacted for the purpose of regulating the business of insurance") (quoting *Fabe*, 508 U.S. at 510-11)); *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 960-61 (3d Cir. 1993) (compelling arbitration of reinsurance dispute does not impair Pennsylvania insolvency law), *Murff*, 97 F.3d at 292 (federal action against insolvent insurer under Age Discrimination in Employment Act ('ADEA") does not impair Missouri insurer insolvency statute); *Bennett* 968 F.2d at 972-73 (compelling arbitration of reinsurance dispute does not impair Montana's insurer liquidation law); *but see Davister Corp. v. United Republic Life Ins. Co.*, 1998 U.S. App. LEXIS 21170 at *12-13 (10th Cir. Aug. 28, 1998) (adopting reasoning of the Fifth Circuit in this case); *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41, 44-45 (2d Cir. 1995) (holding that FAA was reverse preempted by Kentucky law that expressly precluded arbitration of disputes with insolvent insurers).

priority (in descending order) to (1) administrative costs and expenses, (2) employee wage claims, (3) policyholder claims, (4) general creditors' claims, and (3) government claims, Ohio Rev. Code Ann. § 3903.42 (1989). This Court concluded that the Ohio priority statute constituted a law enacted to regulate the business of insurance "to the extent that it regulate[d] policyholders," but that the Ohio statute was not a law enacted for the purpose of regulating the business of insurance "[t]o the extent that is [wa]s designed to further the interests of other creditors," *Fabe*, 508 U.S. at 508. Applying that standard, the Court held that the United States' super-priority was trumped by Ohio's statutory preferences for policyholders and administrative expenses. *Id.* at 509. The Court explained that the policyholder preference was specifically designed to further policyholder interests, and the preference for administrative expenses was "reasonably necessary to further the goal of protecting policyholders," since, "[w]ithout payment of administrative costs, liquidation could not even commence." *Id.* On the other hand, the Court ruled that the United States' super-priority was not reverse preempted by Ohio's preferences for employees and other creditors. Irrespective of whether these preferences might also "redound to the benefit of policyholders by enhancing the reliability of the insurance company," the Court found the connection between these preferences and the "ultimate aim of insurance ... too tenuous." *Id.* at 508, 509.

Then-Judge Breyer, writing for a unanimous court in *Garcia*, applied the standard articulated in *Fabe* to a challenge by the United States to a provision in Puerto Rico's insurance liquidation law that accorded lowest priority to claimants who missed the filing deadline. 4 F.3d at 62. He concluded that this provision—effectively a late-filer penalty—was not "enacted for the purpose of regulating the business of insurance" within the meaning of Section 2(b) of the McCarron-Ferguson Act, *id.* at 61, because it was "neither directed at, nor necessary for, the protection of

policyholders." *Id* at 62. The late-filer penalty was not "directed at" policyholders, he explained, because it "helps policyholders only to the extent that (and in the same way as) it helps all other creditors. That is to say, by penalizing late-filers, the Commonwealth provision may bring about more speedy, orderly liquidation proceedings, thereby (perhaps) reducing the risks (and costs) of extending credit to the company." *Id.* And it was not "necessary for the protection of" policyholders because, unlike the priority for administrative expenses at issue in *Fabe*, liquidation "would still prove manageable" without the late-filer penalty; "[a]t worst, the trustee's job would become slightly more difficult." *Id.*[5]

The Fifth Circuit's holding in this case that the provisions of OUILA centralizing insurer delinquency proceedings in a single state court are laws enacted for the purpose of regulating the business of insurance conflicts with *Fabe* and *Garcia*.[6] Like the preferences accorded

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[5] In *Boozell v. United States*, 979 F. Supp. 670 (N.D. Ill. 1997), a district court held that the federal priority statute was reverse preempted by the Illinois insurer insolvency law to the extent that the latter accorded a preference to the claims of state guaranty funds ahead of those of the United States. While *Boozell's* reasoning is problematic, the result was correct, and fully consistent with both *Fabe* and *Garcia*. State guaranty funds are specifically designed to protect policyholders of insolvent insurers by paying claims on covered policies, subject to certain specified dollar limits. Financed by assessments made against solvent insurers (*see, generally, Reinsurance* (R. Strain ed. 1980) 511 (1980)), these guaranty associations spread the risk of policyholder losses arising from insurer insolvencies among insurers underwriting the specific types of insurance that the insolvent insurer transacted. *Boozell*, 979 F. Supp. at 678. Guaranty associations are accorded the same priority as policyholders in insolvency proceedings because, having paid the policyholders' claims, they are deemed to be assignees of the policyholders' rights under the covered policies. *Id.* This statutory priority is unquestionably both directed at and necessary for the protection of policyholders.

[6] The lower courts' confusion respecting this issue is not limited to the Fifth Circuit. The Eighth Circuit, which held ultimately that Missouri's insolvency law could not preclude a federal court from resolving federal claims against an insolvent insurer, also believed that the State's

employee and general creditor claims in *Fabe* and the late-filer penalty at issue in *Garcia*, Oklahoma's determination to place control over issues relating to insurer delinquency proceedings in a single state court is neither "directed at" nor "necessary for the protection of" policyholders. And, unlike the preference accorded administrative claims in *Fabe*, the centralization of non-policyholder disputes in a single state court is not a necessary prerequisite to liquidation.

The Fifth Circuit concluded that OUILA's centralization of all disputes involving an insolvent insurer in one state court is "reasonably necessary to further the goal of protecting policyholders," because centralization promotes the orderly liquidation of claims and "prevents the dissipation of funds that would occur if the receiver had to defend unconnected suits in different forums across the country." Pet. App. 19a-20a.[7] The asserted benefits to

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provisions centralizing its insurer insolvency proceedings were laws enacted for the purpose of regulating the business of insurance. *Murff*, 97 F.3d at 291. *Accord Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997); *Davister*, 1998 U.S. App. LEXIS 21170 at *13. The Second Circuit reached the same result by other means in *Stephens*, reasoning that Kentucky's scheme for liquidating insolvent insurers, *viewed in its entirety*, was a law enacted to regulate the business of insurance. *See* 66 F.3d at 44-45. Several courts, including the Fifth Circuit in this case, have noted the direct conflict between *Stephens*' statute-as-a-whole approach and *Garcia*'s careful parsing of the specific provision at issue. Pet. App. 17a.; *see also, e.g., Boozell*, 979 F. Supp. at 676-77. The Fifth Circuit acknowledged that *Stephens*' analysis was likely flawed. *See* Pet. App. 17a ("*Fabe's* holding and analysis suggest that a statute may require parsing to determine the extent of its preemptive power under the McCarron-Ferguson Act.").

[7] The Fifth Circuit also asserted that Oklahoma's policy "eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders, who are often relying on policies with the same or similar language." Pet. App. 19a. This rationale is limited, however, to the resolution of policyholder claims. It does not apply to the resolution of disputes between the insolvent insurer and other third

policyholders of a more orderly and efficient liquidation[8] are, of course, the very same that the First Circuit rejected in *Garcia* as (at best) too indirect and tenuous. *Garcia*, 4 F.3d at 62; *see Davister*, 1998 U.S. App. LEXIS 21170, at *19 (Lucero, J, dissenting) ("Like the provision at issue in *Garcia*, a blanket stay of all arbitration proceedings is of general benefit to all creditors and not specifically for the benefit of policyholders"). Just as delinquency proceedings "would still [have] prove[d] manageable" in *Garcia* without Puerto Rico's late-filer penalty, Oklahoma's delinquency proceedings would prove manageable even if all disputes involving the insolvent insurer were not centralized in the state court. "At worst," here, as in *Garcia*, the liquidator's "job would become slightly more difficult." *Garcia*, 4 F.3d at 62.[9]

This aspect of the Fifth Circuit's holding also conflicts with *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). In *Pireno*, an insurer utilized a peer review committee to resolve policyholder claims involving chiropractor services. Applying a now-familiar three-part test—which looks to whether the practice (i) "has the effect of transferring or spreading a policyholder's risk," (ii) is an integral part of the policy relationship," and (iii) "is limited

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parties, such as reinsurers, which arise from (and are limited to) the specific and unique terms of the parties' pre-liquidation contracts.

[8] The Fifth Circuit erred (and displayed an implicit hostility to arbitration) when it presumed that permitting arbitration would increase the cost and complexity of litigation. As this Court has recognized, arbitration proceedings generally are more streamlined and expeditious than litigation. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

[9] The centralization of all proceedings in the state court is not even viewed as essential by the State of Oklahoma. Although OUILA vests the liquidating court with exclusive original jurisdiction over core "delinquency proceedings," Okla. Stat. Tit. 36 §§ 1901, 1903, it explicitly provides that controverted claims that belong to claimants in reciprocal states may be proved in ancillary proceedings in those states. *Id.* at § 1916.

to entities within the insurance industry"—this Court held that the claims review process was not part of the "business of insurance." *Id.* at 129. The Court emphasized that the "challenged peer review arrangement [wa]s logically and temporally unconnected to the transfer of risk accomplished by [the] insurance policies" *id.* at 130, and that the insurer's "use of the [peer review committee] as an aid to its decisionmaking process [wa]s a matter of indifference to the policyholder, whose only concern is whether his claim is paid, not why it is paid," *id.* at 132.

Oklahoma's centralization of actions involving an insolvent insurance company in a single state court is similarly unconnected to the transfer of risk accomplished by insurance policies and is similarly a matter of indifference to policyholders.[10] Indeed, Oklahoma's scheme is even further removed from the business of insurance than was the peer review process in *Pireno;* whereas the peer review process applied only to policyholder claims, Oklahoma's law extends to all lawsuits against the insurer, even where (as here) the suit has nothing whatsoever to do with policyholders.

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[10] *Cf. Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993):

> Puerto Rico's insolvent insurers' liquidation provisions do not bear in the slightest on the substantive outcome of the appeal. These laws provide a procedure through which claims against the insurer can be resolved and its assets equitably distributed. They do not absolve the insurer of any substantive liability. There is no basis for concluding that this court will reach a result regarding the underlying merits of Fragoso's appeal that is any different from the result that a Puerto Rico court would reach, had it stayed the action, or that the liquidator's forum would reach, had the action been forwarded there.

Id. at 882. *See also Mitsubishi Motors Corp.*, 473 U.S. at 628 (arbitration affects only forum in which disputes are resolved, not parties' substantive rights).

B. Permitting Reinsurers To Compel Arbitration Of Disputes With Insolvent Insurance Companies Under The FAA Would Not Impair Oklahoma's Centralized Delinquency Proceedings

The Fifth Circuit also erred when it concluded that enforcement of Petitioners' request for arbitration would "invalidate, impair, or supersede" Oklahoma's insurer insolvency law. Indeed, this error is evident on the face of the opinion. The court of appeals could not rationally conclude that enforcement of the parties' arbitration agreement under the FAA impairs the Oklahoma scheme without finding some inconsistency between the federal law and Oklahoma's laws respecting arbitration. Yet, it found no such inconsistency. To the contrary, the court acknowledged that, applying Oklahoma law, "[t]he Oklahoma state court might well decide to order arbitration of this dispute." Pet. App. 22a n.5. In light of that concession, the Fifth Circuit had no basis to conclude that Oklahoma law reverse preempts the FAA.

More generally, the court had no basis to conclude that resolution of the parties' dispute before an arbitral panel would interfere with the state court's administration of Respondent's delinquency proceedings. In this regard, the position of the Fifth Circuit (and that of the Tenth Circuit in *Davister*) conflicts head-on with the position taken by the Third and Ninth Circuits, both of which have squarely held that the arbitration of a dispute between a reinsurer and an insolvent insurer does not interfere with a state's centralized delinquency scheme. *See Grode*, 8 F.3d at 960 (arbitrators' resolution of dispute between insurer and reinsurer does not impair State's ability to administer the claims process applicable to policyholders); *Bennett*, 968 F.2d at 972-73 (forum in which the dispute between reinsurer and insurer is resolved does not affect the parties' substantive state-law rights).

Although *Bennett* and *Grode* both involved claims brought by an insolvent insurer against a reinsurer, the reinsurers' status as plaintiffs in this action does not warrant a different result. It is equally true that the adjudication of *in personam* claims against an insolvent insurer outside of the liquidation court does not impair a state's administration of a centralized liquidation scheme. In *Murff* the Eighth Circuit held that the McCarron-Ferguson Act does not preclude a federal district court from entertaining a suit brought against an insolvent insurer under the ADEA, notwithstanding that the liquidation court had issued a blanket injunction under Missouri's version of the UILA purporting to stay all actions against the insolvent insurer. The court of appeals concluded that resolution of the ADEA suit in federal district court would not "so substantially impair" the operation of Missouri's insolvency statute as to warrant the surrender of federal jurisdiction. 97 F.3d at 292. In contrast to the Fifth Circuit, Pet. App. 23a-24a, the court in *Murff* correctly recognized that the question is not whether resolution of the case by a forum other than the state liquidating court violates the liquidating court's blanket injunction—it did—but instead whether resolution of the case by a forum other than the state court impairs the integrity and administration of the state court's delinquency proceedings. By focusing narrowly on the injunction, rather than on the underlying state proceedings, the Fifth Circuit's analysis effectively leaves the reverse preemption of federal law to the unfettered discretion of state judges.

Similarly, in *Fragoso*, where the defendant insurer had entered into liquidation after the appeal was docketed, the court of appeals rejected the liquidator's argument that *Burford* abstention was required to prevent undue interference with the Puerto Rico court's orderly liquidation of the insurer. The First Circuit reasoned that its continued exercise of jurisdiction over the appeal would have "at most an indirect effect on the liquidator's claims process by potentially giving rise to an additional claim against the

insolvent insurance company," and thus would "neither discombobulate local proceedings nor frustrate the Commonwealth's regulatory system." 991 F.2d at 884.

The courts of appeals' decisions in *Murff* and *Fragoso* follow from the long-settled principle that the adjudication of an *in personam* claim against a company in receivership does not impair the receiver's administration of the company's assets or the payment of its creditors. More than fifty years ago, in *Morris v. Jones*, 329 U.S. 545 (1947), this Court squarely rejected the suggestion that principles of comity bar a state court from exercising jurisdiction over an *in personam* claim against an insurance company during the pendency of liquidation proceedings. In terms that apply equally here, the Court explained that "[t]he establishment of the existence and amount of a claim against the debtor [in a forum other than the liquidation court] in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have." *Id.* at 549. These principles have been applied consistently in a variety of contexts.[11]

Collectively, this Court's cases establish that the adjudication of the merits of an *in personam* claim against

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11 *See, e.g., Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 575 (1989) (rejecting FSLIC's argument that judicial adjudication of claims outside FSLIC's administrative process would interfere with its liquidation powers, noting that "it was well established at common law" that suits determining the existence or amount of a claim did not interfere with a liquidation court's jurisdiction or the liquidation process); *Markham v. Allen*, 326 U.S. 490, 494 (1946) (rejecting the claim that adjudication of an *in personam* action in federal court against an estate would interfere with probate proceedings in state court, because the *in personam* judgment would not cause any direct interference with property in possession or custody of a state court, despite the fact that the probate court would be bound to recognize the validity of the judgment entered by the federal court when distributing assets); *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 620 (1936) (no conflict between state and federal court jurisdiction in national bank liquidation action).

an insolvent party in a forum other than the state court does not affect the substantive rights of the parties, disturb the possession of the state court, affect the priority of the claimants, or otherwise interfere with the liquidation process. It follows as a matter of law that arbitration of the parties' *in personam* dispute in this case would not impair Oklahoma's delinquency proceedings so as to trigger reverse preemption under the McCarron-Ferguson Act. The Fifth Circuit concluded otherwise only by ignoring this Court's teachings.[12]

II. STATE COURTS CANNOT ENJOIN PARTIES FROM SEEKING FEDERAL REMEDIES IN FEDERAL COURT

Although the Fifth Circuit professed that it was "not saying that a State has the power to enjoin a party generally from pursuing remedies in federal court," Pet. App. 25a, its decision cannot be read otherwise. By holding that Petitioners' federal suit interferes with the state court's blanket injunction against "the commencement or prosecution of any actions ... against the insurer" in a forum outside the liquidating court, Pet. App. 24a, while at the same time conceding that the state court might itself compel arbitration of the parties' dispute under state law, Pet. App. 22a n.5, the court of appeals effectively enforced a state court injunction barring petitioners from pursuing their FAA remedies in federal court. This aspect of the Fifth Circuit's decision creates yet another conflict with the decisions of this Court and other courts of appeals and generates added confusion in the law.

In *Donovan v. City of Dallas*, 377 U.S. 408 (1964), this Court made clear that "[w]hile Congress has seen fit to authorize courts of the United States to restrain state-court

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[12] In this case, both the suit to compel arbitration and the underlying dispute to be arbitrated are *in personam* proceedings. *See* Pet. 12-13.

proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions." *Id.* at 412-13 (footnotes omitted). *Accord, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *United States, ex rel., Council of Keokuk*, 73 U.S. (6 Wall.) 514, 517 (1867); *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 194-96 (1867); *see also General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977) ("rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective").

The Fifth Circuit's conclusion that Congress impliedly "relax[ed]" this long-settled rule when it passed the McCarron-Ferguson Act, Pet. App. 24a-25a, conflicts directly with the Eighth Circuit's decision in *Murff*. In *Murff*, as here, the state court order placing the insolvent insurer into liquidation contained an anti-suit injunction. 97 F.3d at 290. Indeed, Missouri's insurer insolvency act provided expressly that, once a liquidation order was issued, no action could be maintained outside the liquidating court. *Id.*; *see* Mo. Rev. Stat. § 375.1188(1). The Eighth Circuit, however, rejected the suggestion that the plaintiff was prohibited from bringing his action in federal court. 97 F.3d at 290 n.2 ("A state court cannot, of course, enjoin federal court actions"). *Cf. Fragoso*, 991 F.2d at 882 (reaching the same conclusion in abstention case).

Even if the McCarron-Ferguson Act in theory could enable a state to reverse preempt federal courts' subject matter jurisdiction, the Fifth Circuit had no basis to conclude that, OUILA reverse preempts the jurisdiction of a federal district court, sitting in diversity, to resolve the arbitrability of a dispute between a reinsurer and an insolvent insurance company. As discussed above, under this Court's precedents, a state statute purporting to

centralize the litigation of the merits of disputes involving the insolvent insurer in a single state tribunal is not a law enacted to regulate the business of insurance, and arbitration of a dispute between a reinsurer and an insolvent insurer does not impair a state delinquency proceeding. The question of which tribunal is to decide whether particular non-policyholder disputes are arbitrable is even a further step removed from the state's core interest in regulating and protecting policyholders. *See Moses H. Cone Memorial Hosp.*, 460 U.S. at 20 (noting that whether a dispute is arbitrable does not "depend[] at all on which court decides the question of arbitrability," and that a "decision to allow [the arbitrability] issue to be decided in federal rather than state court does not cause piecemeal resolution of the parties' underlying disputes"). State laws purporting to vest in state court the decision whether a dispute is arbitrable are therefore even more clearly outside the scope of the McCarron-Ferguson Act.

III. THE FIFTH CIRCUIT'S DECISION UNDERMINES IMPORTANT FEDERAL INTERESTS

The FAA was enacted specifically to overcome a historic judicial hostility to the enforcement of private arbitration agreements. *Allied Bruce-Terminix Co. v. Dobson*, 513 U.S. 265, 270-71 (1995). The FAA's central and overriding mandate is that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with the rules applicable to other contracts. *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 474 (1989); 9 U.S.C. § 2. By virtue of its enactment, this Court has held that "state courts cannot apply state statutes that invalidate arbitration agreements." *Allied Bruce-Terminix*, 513 U.S. at 272. Yet, according to the Fifth Circuit, a state court may apply a state insurer insolvency statute that invalidates arbitration agreements. The Fifth Circuit's decision in this case directly undermines the "substantial federal concern for the enforcement of arbitration agreements." *Quackenbush*, 517

U.S. at 728-29, and as explained above, contributes to a growing confusion among the lower courts over the scope and application of the McCarron-Ferguson Act.[13]

Because state insolvency laws almost universally contain jurisdictional provisions similar to those at issue in this case, if the Fifth Circuit's decision is not reversed, it will have significant and detrimental effects on the domestic and international reinsurance industry, in which the need vigorously to enforce the FAA is of special importance. As set forth, arbitration clauses have been almost "universally included in reinsurance contracts," R. Carter, *Reinsurance* 146 (1979), in order to reduce the costs, hostilities, and delays engendered by litigation, and to permit resolution of controversies by experts familiar with industry custom and usage. *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983). In light of the number of insurance insolvencies that have occurred in recent years, *see supra* at 2, n.2, the Fifth Circuit's decision threatens to increase significantly the costs of resolving reinsurance disputes.

These effects are particularly significant in light of the international character of the reinsurance industry.[14] Today, there are more than 2500 reinsurers worldwide, Reinsurance Association of America, *Alien Reinsurance in the U.S. Market: 1996 Data 3 (1998)*, and "reinsurers outside the United States account for approximately 42% of all

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13 Whether an insolvent insurance company can be compelled to arbitrate disputes arising from a reinsurance contract is now one of the most widely litigated issues relating to reinsurance. *See* Robert M. Hall, Comment, *Recent Case Developments on Arbitration in US Receiverships*, 1 Int'l J. Ins. L. 51, 51 (Jan. 1998); John H. Binning & Timothy L. Moll, *Arbitration of Reinsurance Disputes in Liquidation of Insurance Companies*, 32 Tort & Ins. L.J. 937 (1997).

14 Although enforcement of international arbitration agreements is governed by a separate chapter of the FAA, 9 U.S.C. §§ 201-08, because the Fifth Circuit's decision turned on its interpretation of the McCarron-Ferguson Act, and not the text of the FAA, it would vitiate international arbitration agreements just as it vitiated the domestic agreement at issue in this case.

reinsurance in the United States. *Id.* at 13. As this Court has recognized, a "contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). For this reason, the "parochial refusal by the courts of one country"—or, as here, one state—to "enforce an international arbitration agreement" may "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.*

CONCLUSION

This Court has repeatedly intervened when decisions by the lower courts have failed to enforce bargained-for rights to arbitration—particularly where, as here, the decisions threaten the ability of U.S. companies to engage effectively in international commerce. *See, e.g., Fabe*, 508 U.S. 491; *Mitsubishi Motors Corp.*, 473 U.S. 614; *Scherk*, 417 U.S. 506. Regrettably, this case necessitates the same corrective action. *Amici* respectfully urge this Court to grant the petition for a writ of certiorari, and to reverse the decision of the court of appeals.

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No. 98-315

(4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN RE-INSURANCE COMPANY
and NAC REINSURANCE CORPORATION,

Petitioners,

—v.—

JOHN P. CRAWFORD, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, AS RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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25 pp

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONERS

1. American Re-Insurance Company (Munich American Reinsurance Company, an appellant in the Fifth Circuit was merged into American Re-Insurance Company):

   Parent Companies:

   Munich Reinsurance Company of Munich, Germany

   American Re Corporation

   Nonwholly Owned Subsidiary Companies:

   None

2. NAC Reinsurance Corporation:

   Parent Company:

   NAC Re Corporation

   Nonwholly Owned Subsidiary Companies:

   None

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-315

AMERICAN RE-INSURANCE COMPANY
and NAC REINSURANCE CORPORATION,

Petitioners,

v.

JOHN P. CRAWFORD, INSURANCE COMMISSIONER
OF THE STATE OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONERS

Petitioners, American Re-Insurance Company and NAC Reinsurance Corporation, respectfully submit this Reply Brief to Respondent's Brief in Opposition to the Petition for Certiorari.

Respondent's opposition to the Petition advances arguments that do not address the conflict between the Fifth Circuit's decision and other courts. Resolution of the reverse preemption issue does not turn on which party commences the action. Moreover, a petition to compel arbitration is not an *in rem* or

quasi in rem proceeding. Respondent's opposition is contrary to *United States Department of the Treasury v. Fabe*, 508 U.S. 491 (1993). *Fabe* requires careful parsing of a state statute to determine if the statute was enacted for the purpose of protecting policyholders. Finally, the recent decision of a divided Tenth Circuit in *Davister Corp. v. United Republic Life Insurance Co.*, 152 F. 3d 1277 (10th Cir., 1998), illustrates how the Fifth Circuit's decision has caused confusion and misunderstanding in McCarran-Ferguson Act preemption jurisprudence.

I. THE FIFTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH DECISIONS OF OTHER CIRCUITS OR THIS COURT

Under the "impairment" prong of the McCarran-Ferguson Act, 15 U.S.C.A. § 1012(b) (West 1997), the Fifth Circuit held that the Federal Arbitration Act, 9 U.S.C.A. §§ 1-16 (West 1970) (the "FAA"), impairs state insurer insolvency laws because disputes that are arbitrable under the FAA are resolved outside the liquidation court. (Pet. App. 23a.)[1] In *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992), however, the Ninth Circuit held the FAA did not impair orderly liquidation or interfere with state insurer insolvency laws, *see id.* at 972-73. The Ninth Circuit's holding in *Bennett* is squarely at odds with the Fifth Circuit's decision here.

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[1] References to "Opp. Br." are to Respondent's Brief in Opposition; "Reply Br. App." are to the Appendix to this Reply Brief; "Pet. App." are to the Appendix to the Petition for Writ of Certiorari.

Respondent's reliance (Opp. Br. at 7-8) upon dicta in *Grode v. Mutual Fire, Marine & Inland Insurance Co.*, 8 F.3d 953 (3d Cir. 1993), and *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372 (9th Cir. 1997) ("*Quackenbush II*") to support his argument that those decisions do not conflict with the Fifth Circuit's because the liquidator commenced those actions, is misplaced. Respondent ignores the lack of any practical consequence or effect on the liquidation proceedings based on the "posture of the parties."

In *Bennett* and *Grode* the parties seeking arbitration removed an action brought by a liquidator to federal court and then moved to compel arbitration. The liquidators maintained that removal and invocation of federal court jurisdiction impaired the state insurance insolvency laws. There is no difference between seeking to compel arbitration in the first instance or doing so following removal. The effect on the state court's purported "exclusive jurisdiction" over delinquency proceedings is the same -- the proceeding is in federal court and the dispute submitted to arbitration if the petition is granted.

Moreover, the effect on policyholders is the same whether the liquidator is seeking to establish a debt owed by a third party or a third party is seeking to establish a debt owed by the insolvent insurer. In either case, the outcome of the action will affect the amount that creditors of the estate, including policyholder-creditors, will receive. The effect on policyholders is indirect in either case and no different from the effect on any other creditor. Importantly, whether a third party is seeking to liquidate a claim against the estate through arbitration or litigation, the priority statute is not impaired or

superseded; it still controls the order of distribution of estate assets.

Further, the "posture of the parties" was not the dispositive factor in either *Grode* or *Quackenbush II*. In *Grode*, the Third Circuit rejected the liquidator's McCarran-Ferguson Act argument as "totally irrelevant." *Grode*, 8 F.3d at 960. The court held that arbitration of the dispute would not interfere with the delinquency proceedings. *Id.* at 960-61. *Quackenbush II* also does not support Respondent's "posture of the parties" argument. The Ninth Circuit's suggestion that defendant Allstate might not be able to compel arbitration under the FAA of its set-off claims against the insolvent insurer, *Quackenbush II*, 121 F.3d at 1381, addressed an issue that was not before the court and which it did not decide.

As to the issue that was before the court in *Quackenbush II*, the Ninth Circuit reaffirmed *Bennett, id.* at 1381, and concluded that "the FAA imposes an absolute command on district courts to order arbitration for *all disputes* that are covered by a valid arbitration agreement." *Id.* at 1382 (emphasis added).

Further, because the alleged "impairment" of state insolvency laws results from submitting disputes to arbitration outside the liquidation court (*see* Pet. App. at 23a), *Murff v. Professional Medical Insurance Co.*, 97 F.3d 289 (8th Cir. 1996), and *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993), rebut both the argument that there is no conflict between the circuits and the argument that the dispositive factor for the impairment prong is the posture of the parties.

In *Murff* and *Fragoso*, the parties sought a judgment against the insolvent insurer in federal court. Although the state liquidation statutes in those cases were, in all relevant respects, the same as the statutes here, the *Murff* and *Fragoso* courts rejected the contention that federal court actions would interfere with the state liquidation proceedings. Therefore, laws permitting federal court actions against the insolvent insurers did not conflict with the jurisdictional and injunction statutes in the respective insurer insolvency laws.

Futher, under the "state law enacted for the business of insurance" prong of the McCarran-Ferguson analysis, the Fifth Circuit's decision cannot be reconciled with *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), or this Court's decisions in *Fabe*, 508 U.S. at 508-09 & n.8, *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982), and *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979).

Respondent attempts to reconcile the Fifth Circuit's holding that the Oklahoma jurisdictional and injunction statutes regulate the "business of insurance" with then-Judge Breyer's decision in *Garcia*, and this Court's decisions in *Fabe, Pireno,* and *Royal Drug,* by merely repeating the Fifth Circuit's statements that these laws benefit policyholders as well as other creditors. Respondent does not deny, however, that these statutes do not confer any greater benefit to policyholders than to other creditors. Moreover, Respondent appears to recognize that any benefit to policyholders from these statutes is both indirect (*see* Opp. Br. at 13-14) and speculative (*see id.* at 16, 17).

Considering these concessions, Respondent fails to reconcile these decisions with the Fifth Circuit's decision.

In *Garcia,* then-Judge Breyer concluded that a statute that provided policyholders with only an indirect, speculative benefit was too tenuous to trigger reverse preemption. *See Garcia,* 4 F.3d at 62. Likewise, in *Fabe* this Court held that state laws that provide indirect and speculative benefits to policyholders or that are not *necessary* for liquidation proceedings to begin, do not reverse-preempt federal law. *See Fabe*, 508 U.S. at 508-09 & n.8; *Royal Drug*, 440 U.S. at 214; *see also Pireno* 458 U.S. at 129 (listing three factors necessary for "business of insurance" test).

In *Davister Corp. v. United Republic Life Insurance Co.*, 152 F.3d 1277 (10th Cir. 1998), the Tenth Circuit followed the Fifth Circuit's decision here to create a new McCarran Ferguson Act doctrine of federal *abstention* on a petition to compel arbitration of a dispute arising under a real estate contract. *Id.* at 1278. As the dissenting opinion in *Davister* makes clear, the Fifth Circuit's decision cannot be reconciled with *Garcia, Fabe, Pireno* or *Royal Drug. See id.* at 1282 (dissenting opinion). *Davister's* new theory of federal abstention, which is based solely on the Fifth Circuit's decision, demonstrates that the latter decision will create confusion in McCarran-Ferguson jurisprudence and the law of abstention unless immediately reviewed by this Court.

II. THE FIFTH CIRCUIT'S INJUNCTION HOLDING CANNOT BE RECONCILED WITH DECISIONS OF THIS COURT AND OF THE EIGHTH AND FIRST CIRCUITS

The Fifth Circuit's holding that a state court acting under an insurer insolvency statute may enjoin *in personam* federal court proceedings (*see* Pet. App. at 24a-26a), squarely conflicts with the Eighth Circuit's decision in *Murff* and the First Circuit's decision in *Fragoso,* notwithstanding Respondent's suggestion to the contrary. Moreover, Respondent's claim that the decisions do not conflict because the federal court proceeding and arbitration were *quasi in rem* actions, is fundamentally flawed.

Contrary to Respondent's suggestion, both the FAA petition and the arbitration in Texas are *in personam* proceedings, making any court-confirmed arbitration award in Petitioners' favor an *in personam* judgment. The terms *in personam, in rem* and *quasi in rem* describe a court's basis for exercising jurisdiction over a defendant. Where, as here, a court's jurisdiction is based on its power over the "person" of a defendant, the judgment and action are *in personam*. *Schaffer v. Heitner*, 433 U.S. 186, 199 (1977). As this Court noted in *Schaffer*:

> If a court's jurisdiction is based on its authority over the defendant's person the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property

> within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Id. Here, the jurisdictional basis for the federal court's and the arbitrators' power to adjudicate the dispute is their power over the insolvent insurer's "person." (*See* Reply Br. App. 2a-3a.) In contrast, the jurisdictional basis in *quasi in rem* actions such as *Schaffer v. Heitner, United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), and *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1930), is the location of property within the territory and control of the forum court. In *Schaffer v. Heitner,* a Delaware court asserted jurisdiction over out-of-state defendants "by sequestering" property located in Delaware. *See Schaffer*, 433 U.S. at 189. Likewise, in *Bank of New York*, jurisdiction over a Russian company was based on the forum court's "control" over that company's property. *See Bank of New York*, 296 U.S. 477. In *Penn General*, both the federal and state courts in Pennsylvania asserted *in rem* jurisdiction over the property of an insolvent insurer in liquidation proceedings. *See Penn General*, 294 U.S. at 194.

Here, there has been no attachment, garnishment, or other assertion of the federal court's power over any property in Texas (*see generally*, Reply Br. App.), and neither the Texas federal court nor the arbitrators could assert control over money

or property in another state.[2] Rather, the district court's power to adjudicate the petition to compel arbitration -- and the arbitrators' power to adjudicate the dispute -- is derived from their power over the insolvent insurer's "person" by virtue of reinsurance agreements that were executed in Texas and which contain written agreements to arbitrate disputes arising under those agreements in Texas under Texas law. (Reply Br. App. 3a, 6a-7a ¶¶ 5, 16-20; Pet. App. 41a, 46a-47a). The making of an agreement providing for arbitration in a particular state confers *in personam* jurisdiction on courts in that state. *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 613 (2d Cir. 1969). *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481-82 (1985) (choice of law provision can be considered in determining whether the court has *in personam* jurisdiction over a defendant). For the same reason, the arbitrators' jurisdiction is *in personam.*

Accordingly, contrary to Respondent's contention, the Fifth Circuit's decision that a state court may enjoin *in personam* actions in federal court, cannot be reconciled with the First Circuit's decision in *Fragoso,* 991 F.2d at 880, the Eighth Circuit's decision in *Murff*, 97 F.3d at 290, or this Court's prior rulings, *see Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 n. 24 (1983); *Donovan v. Dallas*, 377 U.S. 408, 413 (1964); *General Atomic Co. v. Felter*, 434 U.S. 12, 18-19 (1977).

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[2] Further, in determining a debt, the arbitrators will decide Petitioners' contractual, not equitable, rights. Accordingly, there would be no "use of equitable remedies" to circumvent the priority statute.

CONCLUSION

For the foregoing reasons, and as set forth more fully in the Petition for Writ of Certiorari, this Court should grant the Petition for the Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Petition to Compel Arbitration

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In the Matter of the Arbitration Between

MUNICH AMERICAN REINSURANCE COMPANY, and NAC REINSURANCE CORPORATION,

Petitioners,

JOHN R. CRAWFORD, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, AS RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION,

Respondent.

PETITION TO COMPEL ARBITRATION UNDER THE FEDERAL ARBITRATION ACT AND FOR PRELIMINARY INJUNCTION PENDING ARBITRATION

COMES NOW, MUNICH AMERICAN REINSURANCE COMPANY ("Munich American") and NAC REINSURANCE CORPORATION ("NAC Re"), formerly known as North American Company for Property and Casualty Insurance,

Petitioners in the above-styled and numbered cause, seeking (1) an Order under section four of the Federal Arbitration Act, 9 U.S.C. § 4, compelling arbitration of their disputes with the Respondent, JOHN R. CRAWFORD, INSURANCE COMMISSIONER OF OKLAHOMA, AS THE RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION and (2) a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure to maintain the status quo pending arbitration and award:

PARTIES

1. Munich American is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in New York.

2. NAC Re is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in Connecticut.

3. Respondent John R. Crawford ("Receiver"), the Insurance Commissioner of the State of Oklahoma, is the Receiver of Employers National Insurance Corporation ("ENIC") in Receivership. ENIC is a corporation duly organized and existing under the laws of the State of Oklahoma, with its principal place of business in Oklahoma.

JURISDICTION

4. Jurisdiction is based upon diversity of citizenship of the parties under 28 U.S.C. § 1332(a)(1) in that the matter in

controversy exceeds the sum of $50,000, exclusive of interest and costs, and is between citizens of different States.

VENUE

5. Venue is proper in the United States District Court for the Northern District of Texas, Dallas Division, under the forum selection clauses in the reinsurance agreements out of which these disputes arise, by which the parties have chosen to arbitrate any disputes arising thereunder in Dallas, Texas.

BACKGROUND

6. Pursuant to Umbrella Liability Reinsurance Agreement CAF 4139 ("MARC Agreement") between Munich American and Employers Casualty Company (including subsidiaries)(collectively the "Company"), effective January 1, 1986, Munich American agreed to pay to the Company a certain percentage share of the amount of net loss allocable under each Umbrella policy covered by the MARC Agreement. (A copy of the MARC Agreement is annexed as Exhibit A).

7. Pursuant to an Umbrella Liability Reinsurance Agreement ("NAC Re Agreement") between North American Company for Property and Casualty Insurance, now NAC Re, and Employers Casualty Company (including subsidiaries) (collectively the "Company"), effective January 1, 1986, NAC Re agreed to pay to the Company a certain percentage share of the amount of net loss allocable under each Umbrella policy covered by the NAC Re Agreement. (A copy of the NAC Re Agreement is annexed as Exhibit B).

8. Under the MARC Agreement and the NAC Re Agreement (collectively, the "reinsurance agreements") "net loss" means, "all payments by the Company in settlement of claims or losses . . . after deduction of salvage . . . ." (See Exs. A and B at Article IV(A)). "Salvage" is defined in the respective reinsurance agreements as follows:

> Salvage - This term shall mean any recovery made by the Company in connection with a claim or loss, less all expenses paid by the Company, other than payments to any salaried employee of the Company making such recovery.

(Exs. A and B at Article IV(C)). The agreements also provide for subsequent adjustments in net loss and payment of any amounts due either party:

> Upon receipt of a definite statement of net loss from the Company, the Reinsurer shall promptly pay to the Company the Reinsurer's portion of net loss and the Reinsurer's portion of adjustment expense, if any. Any subsequent changes in the amount of net loss shall be reported by the Company to the Reinsurer and the amount due either party shall be remitted promptly.

(Exs. A and B at Article XII(A)).

9. ENIC is a subsidiary of Employers Casualty Company and is a reinsured under the reinsurance agreements.

10. In 1991, Jobs Building Services, Inc. ("JOBS") settled a wrongful death claim requiring ENIC to pay $2,065,000 under an umbrella policy. Pursuant to their respective reinsurance agreements, Munich American paid $829,250, plus expenses, and NAC Re paid $829,250, plus expenses, as their respective shares of ENIC's net loss.

11. Subsequent to payment by Munich American and NAC Re, ENIC commenced an action against General Accident Insurance Company ("General"), the underlying insurer on the JOBS claim seeking damages due to General's improper handling of the claim. In 1994, ENIC, then in receivership, obtained a judgment against General in the United States District Court for the Southern District of Texas. General unsuccessfully appealed the judgment and subsequently settled the case for $2,500,000.

12. In June 1995, the net settlement funds, in the amount of $1,500,000, were tendered to and accepted by the Receiver on behalf of ENIC. (A copy of an October 4, 1995 letter to NAC Re acknowledging receipt by ENIC in Receivership is annexed as Exhibit C).

Disputes Arising Out of Reinsurance Agreements

13. Munich American and NAC Re claim subrogation rights to these settlement funds because they constitute "salvage" recovered in connection with the JOBS claim for which Munich American and NAC Re have paid their respective shares under the reinsurance agreements.

14. Disputes have arisen between the Receiver and Munich American and NAC Re concerning Munich American's and NAC Re's claims to their shares of these settlement funds.

15. The Receiver refuses to tender to Munich American and NAC Re their respective shares of these settlement funds.

Petitioners Have Been Aggrieved by Receiver's Unequivocal Refusal to Arbitrate

16. Each of the reinsurance agreements contains an agreement to arbitrate disputes. Article XV, entitled "Arbitration," which is identical in both reinsurance agreements, provides in part:

> As a condition precendent (sic) to any right of action hereunder, any dispute arising out of this Agreement, as well as any differences concerning the validity of this Agreement, shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire meeting in Dallas, unless otherwise agreed. The laws of the State of Texas shall govern the interpretation of this Agreement.

(See Exs. A and B at Article XV(A)).

17. On June 11, 1996, Munich American and NAC Re requested that the Receiver agree to submit these disputes to arbitration under the reinsurance agreements. (See Exhibit 1 to the Declarations of William J. Albinger, Jr. and Christopher F. Finneran annexed hereto as Exhibits D and E, respectively).

18. On June 21,1996, the Receiver, unequivocally refused to agree to submit this dispute to arbitration. (See Exs. D and E at Exhibit 2).

19. Munich American and NAC Re are bound by their reinsurance agreements to arbitrate this dispute with the Receiver. The reinsurance agreements prevent the parties from resolving this dispute in any other forum. Consequently, Munich American and NAC Re have been aggrieved by the Receiver's refusal to submit this dispute to arbitration.

20. Therefore, as set forth in the accompanying Memorandum of Law, Munich American and NAC Re are entitled, under section four of the Federal Arbitration Act, 9 U.S.C. § 4, to an Order compelling the Receiver to submit this dispute to a board of arbitration in Dallas, Texas in accordance with Article XV of the MARC and NAC Re reinsurance agreements.

Preserving the Status Quo

21. Upon information and belief, the Receiver has retained the settlement funds and has not as yet used or disposed of them in any manner. Munich and NAC Re have advised the Receiver that these settlement funds are not part of the ENIC insolvency estate, but as a matter of law are deemed to be held in trust by the Receiver for Munich and NAC Re as subrogees. However, the Receiver refuses to relinquish control of the settlement funds to Munich American and NAC Re.

22. Therefore, as the Receiver continues to withhold these settlement funds, Munich American and NAC Re continue to

suffer immediate harm. This harm is irreparable if the status quo is not preserved with respect to these funds. If the Receiver disposes of any part of these funds, Munich American's and NAC Re's remedy will be inadequate and the arbitration will become a hollow formality.

23. A preliminary injuntion to preserve the status quo pending arbitration will not harm the Receiver, and will serve the public interest in honoring contracts and furthering the policy of the Federal Arbitration Act.

24. No previous application has been made for the Order or relief sought herein.

WHEREFORE, PREMISES CONSIDERED, petitioners Munich American Reinsurance Company and NAC Reinsurance Corporation respectfully pray that this Court issue an Order compelling the Receiver to proceed with arbitration and a preliminarily injunction to preserve the status quo pending arbitration prohibiting the Receiver from using, encumbering, or otherwise disposing of the settlement funds of $1,500,000, and the interest earned thereon, pending the arbitration and award, and such other relief as the Court deems appropriate.

Dated: Dallas, Texas
July 18, 1996

Respectfully submitted,

/s/
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